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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 85

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.-C. I. O., LOCAL No. 392, PETITIONERS,

vs.

LAWRENCE WHIRLS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1946.

CERTIORARI GRANTED JUNE 10, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1099

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL WORKERS OF AMERICA, U.A.W.-C.I.O., LOCAL No. 392, PETITIONERS,

vs.

LAWRENCE WHIRLS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

LAWRENCE WHIRLS, Plaintiff,

v.

THE TRAILMOBILE COMPANY, Defendant

Civil No. 1303

Transcript of Oral Proceedings

Filed January 24, 1946

Be It Remembered, that on Wednesday, November 28th, 1945, at 10 o'clock A. M., the above styled case came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division. The following were the proceedings.

Appearances:

Byron B. Harlan, for the Plaintiff.
Philip J. Schneider, for the Defendant.
Sol Goodman, for the Intervening Petitioner.

The Court: I assume in view of the answer of the intervening petitioner here that their plea is generally res judicata, is that right?

[fol. 2] Mr. Goodman: Yes, Your Honor, and there is one plea in both our answer and Mr. Schneider's which is almost in the nature of a demurrer, that is, that we set up the fact that the plaintiff had his job for more than one year and no longer had any right or standing in Court.

The Court: Well now, what I am driving at is this: we are the midst of a trial here, but we want to try to dispose of this matter, and it seems to me that there are a number of things that can be agreed upon by stipulation here. Will it be stipulated by the parties that the pleadings in the State Court, together with the rulings of the State Court, be made a part of this record? That will save considerable time.

Mr. Schneider: We will so stipulate on behalf of The Trailmobile Company.

The Court: What's the next point?

Mr. Harlan: Your Honor, there is very little dispute as to the facts in this case. But there are some facts that are not included in the pleadings that substantiate facts that go to plaintiff's equities in this matter.

The Court: Will you make a brief statement?

Mr. Harlan: That's what counsel and I had tentatively agreed upon that statements would be made, and that wherever a disagreement occurs in those statements, then evidence could be introduced on those points. In this case, Your Honor, there was the Highland Body Company, a manufacturing company, operating in Cincinnati, as one corporation, a New Jersey corporation, I believe, and the Trailmobile Company, an Ohio corporation operating in another part of the City. The stockholders of the two companies were the same,—the officers of the two companies were the same. During the year 1943, gradually the officers moved the plant, the equipment and the supplies from the [fol. 3] Highland Body Manufacturing Company, over to the Trailmobile Company, and gradually transferred the employees of the Highland Body Manufacturing Company over to the Trailmobile Company, so that, by the end of that year, the equipment and the whole business was over at the Trailmobile Company and the personnel. On December 31 of that year, the Trailmobile Company entered into a contract with the Highland Body Manufacturing Company, whereby the Trailmobile Company took over the whole business. The Highland Body Manufacturing Company executed a bill of sale and there was a plan of consolidation or transfer executed at that time. At that time, the Trailmobile Company, in their plan of consolidation, agreed that they would assume all the debts and obligations, carry out and pay all debts and obligations of the Highland Body Manufacturing Company. During this year of turn over, a dispute arose between the employees of the two companies on the question of seniority. The evidence will show that in the preceding year of 1942, that is, the last full year of the Highland Body Manufacturing Company, they had slightly over 100 employees; that was during 1942. During that same year, the Trailmobile Company had slightly more than 1,000 employees. The ratio of the employees of the two companies was one to ten. The evidence would show

that during 1943, the Highland Body Manufacturing Company did a business in excess of one and a half million dollars, while the Trailmobile Company did a business of ten million dollars. In other words, the ratio of employees was as one to ten, whereas the ratio of the value of the work that they did was as one to eight. The Highland Body employees insisted that they should have on this consolidation and under the contract that was entered into between the officers of the two corporations, the same seniority [fol. 4] status, depending upon when they went to work, as the employees of the Trailmobile Company. The Trailmobile employees insisted that the Highland Body employees should be considered new employees at the Trailmobile Company. At that time, both of those companies were organized in the American Federation of Labor. This matter was submitted to the national organization of the American Federation of Labor, and that organization decided in favor of the Highland Body employees to the extent that the seniority of the employees should be just the same as though they were all under the same employer, which, as a matter of fact, they were, except for the fiction of the two corporations. Immediately the employees of the Trailmobile Company broke away from the American Federation of Labor and organized as a unit of the C. I. O. and had a vote of the joint employees. The Labor Board decided that the election should be as a unit, and naturally, the employees of the Trailmobile Company, out voted the employees of the Highland Body Manufacturing Company, and a contract was entered into whereby the employees of the Highland Body Manufacturing Company, in matters of seniority, were considered new employees and their seniority dated from January 1, 1944. This was litigated. A man by the name of Hess, I think his name was, representing the American Federation of Labor employees in the Highland Body Manufacturing Company, litigated the matter in the State Court, and contended that under the National Labor Relations Act, the bargaining agents of the two joint labor groups there, did not have the power to enter into a contract with the employer waiving the seniority rights of the Highland Body Manufacturing Company employees. The Court decided against them on that proposition. I might say that I find no place in the record [fol. 5] that this contract that was entered into between the Highland Body Manufacturing Company and the Trailmo-

bile Company, exclusively vested in the two companies, and the effect of that contract, that does not appear to have been discussed in either the Common Pleas Court or the Circuit Court; at least, they didn't mention it in their decisions. The Common Pleas Court decided that under the National Labor Relations Act, the bargaining agent could bargain as he pleased over questions of seniority, and therefore, dismissed the injunction suit. This went to the Court of Appeals and the Common Pleas Court was sustained and the Supreme Court refused to take it in. However, in the decision of the Common Pleas Court, that Court expressly said that this decision does not affect the rights of veterans under the Selective Service Act. So that, it will be our contention that that is not res judicata, as the Court expressly excepted the question that is before Your Honor this morning.

The Court: Now, of course, there's one point right here, —Lawrence Whirls. This concerns Lawrence Whirls.

Mr. Harlan: Yes, it concerns Lawrence Whirls; of course, the plea of res judicata does. I haven't gotten to that yet. May I say I will start right in on the point Your Honor makes. Lawrence Whirls entered the employ of the Highland Body Manufacturing Company in 1935,—one of the oldest employees out there. In 1942, he entered the military service; he came back in May of 1943. Now, Your Honor will recall that that was during the period in which the employees were moved over to the Trailmobile Company, when he re-entered the employment of the Highland Body Manufacturing Company, at his old seniority, which was accepted at that time as old seniority. In June of 1944, he entered and became a member of the C. I. O. union. [fol. 6] Based upon that entry, the defendants contend that he is therefore obligated by this bargaining contract, because he was a member of the C. I. O. union. In connection with that, the testimony will show that this is a closed shop operation. If one is not a member of the C. I. O. union, he can't have employment at all,—he loses both his seniority and his job. The defendants are now contending that if he joins the union, he has to give up his seniority, whether he is a veteran or not, because he is a member of the union. So that, anything such an employee does, whether veteran or not, he loses his seniority, according to the contention of the defendants here. The facts disclosed as to the equity of this matter are, that the employees of the Trailmobile

Company have appropriated to themselves this production of the Highland Body Manufacturing Company, which constituted one-eighth of their own production, and have added that one-eighth to the security of their own seniority. Of course, Your Honor understands that seniority means nothing or much, depending upon the backlog of employment; that's all it means. So, they have taken this backlog, that employment, which was one-eighth of the production that they had created, they have deprived the employees of the Highland Body Manufacturing Company, who created this employment, of this backlog, and taken it over for the employees of the Trailmobile Company,—they have deprived them of all rights in that as security for their own jobs. I will submit that under oath as the facts in the case, entirely aside from the stipulation. Now, the law we will take up afterwards.

The Court: That's what I want to get to. As I understand it, this case is in here by reason of the Selective Service Act, by which Congress gave protection to returning veterans. Now, that's the law by which we take jurisdiction.

[fol. 7] Mr. Harlan: I am just wondering whether we hadn't better have opposing counsel clear up any disagreement as to facts before we start in on any statement of the law.

The Court: Is there any disagreement on the facts, on the basic facts of this case up to this point?

Mr. Schneider: On the basic facts as raised by the issues in the pleadings, I don't think there is any disagreement there at all.

Mr. Harlan: I should like to have Mr. Goodman's statement.

Mr. Goodman: Mr. Harlan, in explaining to the Court about the decision by the A. F. of L. union, pointed out that it had decided seniority in favor of Highland.

The Court: Here's the point that the Court is concerned about now first, and that is, the jurisdictional question.

Mr. Goodman: All right. If it is jurisdiction, we can waive any additional facts right now if the Court wants to go into jurisdictional question. And since we raised that in our answer, of course, we allege a prior decision on the jurisdictional question.

The Court: You see, we are not trying the rights of all the veterans that were employed by the Highland Body

Company, as I see it. We have only one here. If we had more than one, then we might be concerned with the rights of each and every one. The point that stands out here now is the third defense of the Trailmobile Company that suit was filed more than one year after the re-employment.

Mr. Harlan: That's the whole case, as I see it. But I would like to get Mr. Goodman's statement in the record as to what facts I stated he disagrees with, not only for the benefit of Your Honor, but for the benefit of the record. That's what I would like to have before we discuss the law, if it is agreeable to the Court.

[fol. 8] The Court: As long as it doesn't take too long, what are the facts that you disagree with?

Mr. Goodman: As I started out saying, first, Mr. Harlan deals with what preceded while this union was an A. F. of L. union. He mis-states the facts, because the A. F. of L. Executive Board has ruled on the pairing of seniority first, and then on the date of hiring. It is not material at all in this case, but he has gone into the subject.

The Court: If it is not material, then we are not interested in it.

Mr. Goodman: Then he refers to the N. L. R. B. having decided on the Trailmobile and the Highland Body as one unit for the election. That is not correct. The N. L. R. B. had decided part of the Highland as a separate unit, part of Highland along with Trailmobile in the election unit. Mr. Harlan refers to the suit brought by Hess in the State Court. And that is incorrect, because the plaintiff in this case is specifically named as one of the parties in the Hess suit in the State Court, he having returned to employment at that time and being in the plant when the suit was brought, and having a direct knowledge that the suit was brought in his behalf, as well as in behalf of Hess for himself. Then reference was made to the fact that the State Court had no evidence of the bargaining contract between Highland and Trailmobile. Mr. Harlan is correct in stating that the opinion of the State Court makes no mention of it, but the record in the State Court contains that evidence. With those additions, we can go into the legal questions.

Mr. Harlan: I accept Mr. Goodman's corrections. If I stated that the Federation of Labor decided in favor of the seniority of the Highland employees, I merely meant that they decided the contention that the Highland employ-

[fol. 9] ces made at that time to the effect that they should take the same seniority status as the employees of the Trailmobile Company, depending upon their date of employment. And that's correct, is it not? I didn't intend to say that the Highland employees had superior seniority rights. I think I can concede everything else that Mr. Goodman says. Now, I neglected, Your Honor, to bring the books up that I intended to have here.

Mr. Goodman: May I say this,——

Mr. Harlan: I wanted to get the law here, Your Honor.

Mr. Goodman: Your Honor, I think that before the Court considers the argument on this statement of fact, there should also be in the record the fact that there are some 120 service men that had been employed at the Trailmobile, who have returned and are now again employed.

The Court: No, we are hearing the case of Lawrence Whirls.

Mr. Goodman: For this reason, Your Honor. We are contending that Lawrence Whirls' rights as a service man cannot interfere with the rights of other service men. In other words, the statute gives the rights to service men,—not just to Lawrence Whirls.

The Court: I know, but just so there is no mistake about it, the parties here now are Lawrence Whirls and the Trailmobile Company, with the C. I. O. intervening, and that's all, and the issue is between those parties. We have to confine it to the issue; that's all there is to that.

Mr. Goodman: If we are going to get a stipulation of fact, Your Honor, I will offer this, and the Court can decide later whether it applies or not,—that there are some 20 service men that formerly worked at the Highland Body Manufacturing Company, who have been given employment at Trailmobile, and that in point of time of Lawrence [fol. 10] Whirls or any others of the 20 former Highland employees, were given seniority as of their date of hiring at Highland, they would be placed ahead of a great number of former Trailmobile men who are returned service men. Now, with that additional fact, we can go to the law.

Mr. Harlan: I want to put the exhibits in now, Your Honor, but before putting the exhibits in, along the line of what Mr. Goodman has said, I might say that one of those service employees, a man by the name of Inskeep applied to the C. I. O. union for membership within the year that the contract provided. His application for membership was

refused, and he was discharged from the Trailmobile Company just as I said in my opening statement here was the condition. In other words, if they don't join the union,—and he couldn't get into the union,—they are discharged, and the defendant is saying that if they do join the union, they lose their seniority.

The Court: Well, of course, there are millions of returned service men. But we are confined to the issue here now. If we make up a record, we are going to make up a record between the parties here.

Mr. Harlan: I say that, Your Honor, just to call Your Honor's attention to the fact that it is not a theory I am stating to you,—it is an actual condition that occurs bearing on the equities of the case, and this is an application for an injunction and the Court will take into consideration the equities of the case.

Mr. Goodman: I must enter an objection to that, for when Inskeep returned, it was not a closed shop, and they could not have been dismissed whether they joined or not. Under their veterans rights, they were not subject to discharge for one year, except for cause.

The Court: All right. Now, let's proceed with the case of Lawrence Whirls.

[fol. 11] Mr. Schnieder: I haven't had a chance to say anything, but I think there is one additional fact or little series of facts that should be presented in connection with the Whirls case that has to do with the equities of the matter. The allegations of the petition say that at the time the suit was filed he had prior to that time been employed in the paint shop at a rate of approximately $1.05 an hour, and that at the time of filing the complaint he had been reduced to the stock room at some 83 cents an hour, due to January 1, 1944, seniority. Since the filing of the petition, the evidence will show that he has been transferred from the stock room to the body shop and is now being paid $1.12. In April, 1946, automatically he will get $1.18,—isn't that right? I will correct that, he is now getting $1.18, and in April he will automatically get $1.25, and that is a higher rate than any rate in the paint shop that he would be qualified to receive. I think that's material to the equities of the situation.

The Court: Well, it certainly is material, in view of the prayer of the complaint that they be restrained from reducing the pay.

Mr. Harlan: I might say that, of course, I drew this petition in the light of the facts existing at that time. I am not at present saying anything about rates of pay. Our whole case is this,—that if the quantity of work should suddenly drop, this man, who in the Highland Company has a seniority going back to 1935, would be one of the last if not about the last man to be discharged from there. But he would now be one of the first to be discharged. It is his seniority that we are complaining about at this time, not the pay, because all that has been changed since. But still the injunction should be granted so far as he is concerned. The fact that during this year, they have actually raised his wages, doesn't indicate that perhaps next week they might not reduce his wages.

[fol. 12] The Court: Here's the prayer,—"this plaintiff prays that defendant herein be temporarily restrained from reducing the pay of plaintiff below $1.05 per hour and from changing the seniority status of plaintiff to the control date of January 1, 1944, and that a mandatory injunction be directed to defendant herein requiring this defendant to reinstate plaintiff in his former position in the painting department." I assume Mr. Whirls himself wouldn't want that in view of the statement that he is now making $1.18. Now, could we at this time change the prayer, if you want to limit the question to this seniority right?

Mr. Harlan: I don't think it would be necessary to change the prayer, because we would have this statement of facts that have happened since the petition. But I am perfectly willing to have Your Honor pass upon the seniority rights alone at the present time. He has not suffered any hardship other than that.

The Court: All right; that brings us up to the point of law.

Mr. Harlan: Well, it brings us up to the exhibits; I want to get them in. I am offering in evidence the plan of liquidation whereby the Trailmobile Company assumed the debts, liabilities and obligations of the Highland Body Company.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit A.

Mr. Harlan: Then I am offering the bill of sale.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit B.

The Court: That's all stipulated. Those will all be part of the record any way. It is not necessary to put them in now. We agreed that all those matters will be made a part of the record without you putting them in now.

[fol. 13] Mr. Harlan: I don't know how we can get them into the record without putting them into it, in open Court.

Mr. Goodman: Mr. Harlan, as I understand it, we are going to stipulate these exhibits, along with the record in the State case, into the record as part of your case.

Mr. Harlan: Let me state them into the record at this time,—that there will be introduced into the record, a copy of the employer-employee agreement of employment of 1940-1942, to cover the date when Mr. Whirls left the employment of the Highland Body Manufacturing Company.

And said pamphlet so offered in evidence, is made a part of this record, as Plaintiff's Exhibit C.

Mr. Harlan: There will also be introduced into the record a copy of the agreement of 1945, entered into between the bargaining agents of both of these unions and the Trailmobile Company, whereby the seniority was put forward for the Highland Body employees to January 1, 1944.

The Court: Let them all be accepted and made parts of the record.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit D.

The Court: Now, I think what we are interested in mainly here is the third defense: "That plaintiff returned to work after being discharged from the military service of the United States on May 3, 1943, and that this action was not filed in the United States District Court or any other Court until September 18, 1945, more than one year after the re-employment of defendant herein, and that plaintiff has not been deprived of any rights granted by Section 308, Title 50 of the laws adopted by the Congress." [fol. 14] Now, he is claiming his rights here under Section 308, Title 50.

Mr. Harlan: If Your Honor could get before you while this is being discussed, a copy of the Code, Section 308, I think it would be helpful. It is Title 50, Appendix Section.

The Court: What volume does it start with?

Mr. Harlan: 50, War,—50 Appendix. Now, Your Honor, the basis of this question rests in a joint resolution of Congress passed in August, 1940. That resolution, so far as it referred to the re-employment of veterans, was the same as the existing law, except as to sub-paragraph c of main paragraph C,—no, it is sub-paragraph c of section 3. If Your Honor has 308 there, over on page 31, you will find a small letter c paragraph about the middle of the page under big letter C toward the top of the page. I am afraid Your Honor is looking at the second paragraph c toward the bottom of page 31,—if you will look at the paragraph c that's under those three letters A, B and C,——

The Court: Now, what do you want me to look at?

Mr. Harlan: About half way down page 31, you will see a small c paragraph; that's the thing. Now, when the joint resolution was originally passed in August, of 1940, the re-employment provisions, were substantially if not exactly the same,—at least the only changes that I am going to call Your Honor's attention to,—are in small, paragraph c up here. Now, paragraph c, as originally passed read as follows: "Any person who is restored to a position in accordance with the provisions of paragraph A or B of sub-section b,"—now, there has been a lot inserted, but as originally passed, "shall be so restored without loss of seniority, insurance participation or benefit or other benefit, and such person shall not be discharged." Now, the last clause is just the same as it is [fol. 15] here,—"and shall not be discharged from such position without cause within one year after such restoration." Now, that joint resolution was subsequently, in October, I believe of that year, passed as a law, and the amendments were put in it as found now in the paragraph c that you are reading. And that was again passed as a law, I think, in 1943.

The Court: Well, this section is the law to-day?

Mr. Harlan: This section is the law to-day. But I am using that to bring out my point that that's one of the limitations,—if it were not for this clause in here, "and shall not be discharged from such position without cause within one year," then we would have no law suit. The whole question that is before Your Honor is, does that phrase, in which it says "and shall not be discharged," apply to his seniority benefits, his insurance benefits, his right to vacations and all the other benefits, and it is my

contention that that "shall not be discharged . . . within one year," simply applies to that clause, and does not apply at all to his seniority rights.

The Court: Well, now, hold up for just a minute and see if we can't get an agreement to this. As I take it now, it is the defense of the C. I. O. and the Trailmobile that it was the intention of Congress to protect this man only for one year after employment.

Mr. Schneider: After employment, and the defense here is, that after a year, they are out on their own. In other words, seniority is the thing itself, the security, which a man has in his job during this year, and, so long as he does his work, he can't have any higher seniority than Mr. Whirls has in his job. And, our contention is that this seniority was granted for one year.

[fol. 16] The Court: I wonder if we can't narrow the issues to the point that the contention of the government is, that the returned veteran, when he returns, shall be immediately restored to his seniority, and that that right of seniority is to be continued up until to-day.

Mr. Harlan: That's my contention.

The Court: That's your contention, and will continue until Congress changes the law. Now, it is the position of the Trailmobile and the C. I. O. that that protection is only for a year, and, after the end of the year, that he loses that right to seniority, and he then becomes bound by the decision of the State Court in that other litigation. Is that your position?

Mr. Schneider; No, Your Honor, I wouldn't put it just that way. As I see the case; there are two separate defenses. One is that the State Court determined the corporate status of those two corporations; therefore, that this man is bound under Erie Railroad against Thompkins by the decision of the State Court, and his position is no better than any other employee involved in that litigation. The second is, that notwithstanding the decision of the Ohio Supreme Court and notwithstanding the corporate status of those two corporations, nevertheless he came back and was employed, and he was employed for a year and more than a year, and having been employed that year as a member of the union, with all the rights of employees, his seniority went with the majority union as

the collective bargaining agent of the whole, and it expired as of that time.

The Court: That's what I am talking about. It is your position that having been restored to the employment that he had before he went into the service, that the protection of the Act of Congress only extended to that one year.

[fol. 17] Mr. Schneider: That's right.

The Court: That having joined the C. I. O., and being made a part of this litigation, that he waived any rights that he had. Your position is that it was the intention to protect him for a year and that Congress was no longer interested in the veteran.

Mr. Goodman: Now, we have additionally, that this Court ordinarily would not have jurisdiction in this type of suit between an individual and his employer.

The Court: The only jurisdictional rights that we have, come in under Section 308.

Mr. Goodman: That's what I wanted to point out. That Section gives this Court jurisdiction, and if Lawrence Whirls claims that his rights were interfered with under that Section, Congress fixes the time within which he could complain as one year. If within that year he claims his seniority rights were being taken away from him, he was given the right to go into the Federal Court.

The Court: Now, since we have that, will it be stipulated by the parties that by reason of the Hess litigation, that Lawrence Whirls doesn't have the seniority position that he would have had before? Will it be stipulated that his present situation in Trailmobile is not what it was when he returned from the service? That makes a clear cut issue.

Mr. Goodman: We can't stipulate that.

The Court: That's a fact, though, isn't it?

Mr. Goodman: No; I want to point out what we can agree to, with which I think Your Honor will agree, and that is this; the dates are in the record as to when Whirls was employed by Highland,—when he went into the service,—when he returned in 1943 and went back to Highland,—when Trailmobile purchased or bought out Highland, [fol. 18] and the seniority that was given to him in Trailmobile as of January 1, 1944. All those are in the record and we agree with them, but we don't agree with that pos-

sible conclusion that he has been deprived of any rights by reason of——

The Court: I am not asking you to agree that he has been deprived of anything. I just want what the facts are. As I understand it, you went along with Mr. Harlan. The employees from Highland Body Manufacturing Company, so far as seniority is concerned, are subordinated to the Trailmobile?

Mr. Goodman: No, that is not true. The contract was made in 1945. It started in 1944 and was signed and approved in June of 1944. Highland employees were given seniority as of January 1, 1944, and it put them ahead of many Trailmobile employees and behind others, because they didn't get the same dates as the dates of hiring in Highland.

The Court: They didn't get the assignment of the same dates as the dates of hiring in Trailmobile?

Mr. Goodman: As they had in Highland; that affected a large number,—there were several hundred of them.

The Court: The point now is,—will it be stipulated to this extent, that Whirls' present status is not equal to that of the employees of Trailmobile who were employed by Trailmobile as of the same dates that he was employed by Highland?

Mr. Goodman: Well, that's true as a conclusion. It also is part of our contention that Whirls and all other Highland employees became employees of Trailmobile on January 1, 1944.

The Court: He went to work for Highland in 1935, but his present seniority status is as of January 1, 1944?

[fol. 19] Mr. Schneider: That's right; I think Your Honor has that now.

The Court: That's what I say. It is Mr. Harlan's contention, as I understand it, that Whirls, by reason of Section 308, is entitled to a seniority status as of 1935, when he went to work for Highland,—is that right?

Mr. Harlan: Yes, Your Honor, but our contention is that when he went into the Army, he had a priority dating from 1935, and since the contract that was entered into in June of 1944, which is involved in this case, it is claimed that he has only a seniority dating from January 1, 1944: in other words, he has lost five years seniority.

The Court: Now, we have got down to the issue.

Mr. Harlan: Now, the question, as I said a moment ago, that is before this Court is,—does that clause that says that he shall not be discharged from such position without cause for one year after such restoration, control the whole of the rest of the Act? That's the whole question. And, it is our contention, Your Honor, that this re-employment provision in the Selective Service Act had two definite purposes, and those purposes are shown more clearly in the original joint resolution because they are more direct, than in paragraph c that I have just read to you, wherein it says that he shall get his seniority rights and his insurance benefits, and he shall not be deprived within one year.

The Court: Now then, we don't want to lose sight of what we have accomplished here. The record is made up and all these exhibits are in agreement on the facts. So, the question now is, should the Trailmobile Company be mandatorily enjoined to restore Lawrence Whirls to the seniority status of 1935 on an equal basis with Trailmobile employees who were employed in 1935? Is that right?

[fol. 20] Mr. Harlan: That's right, Your Honor, that's the question.

Mr. Schneider: Can Your Honor date it over and let each side furnish a brief?

Mr. Harlan: I am in complete accord with Your Honor, I think I can get my brief in to-day.

The Court: If I were you, I would take a week. Now that we have the issues narrowed, is that agreed?—that the issues are narrowed to that one issue?

Mr. Harlan: Of course, they still maintain their defense of res judicata.

The Court: I am not so concerned about the issue of res judicata as I am about just what was intended by Section 308,—whether Section 308 intended that when this man came back after entering the service, his seniority status was established regardless of the year or not.

Mr. Schneider: Your Honor doesn't care for a brief on the other two points?

The Court: I think that's very important, as it appears this case is not going to end here,—that is it will go to the Court of Appeals. So, in looking toward the Court of Appeals to convince them I would have a full brief from the parties here. If you can get it in to-day, all right. But

we are engaged in trials here every day, and I would think it would take a week to give us a full brief. It has been hanging here, let's see, it was filed September 18th, but we will crowd it along just as fast as we can.

Mr. Goodman: It is agreed, of course, that we will supply to the record the evidence that we have referred to on res judicata.

The Court: You can make up that record right away.

Mr. Harlan: Entirely aside from how soon my brief is supplied, how soon would Your Honor expect a brief from the defendants?

[fol. 21] The Court: Well, say the third day after. Will that be sufficient? Then we will have all the briefs within ten days, no longer, and I will promise you a prompt decision.

Mr. Harlan: It is simply a question of statutory interpretation.

The Court: And I will promise you it will be promptly decided on that phase.

Mr. Schneider: We will offer in evidence on behalf of the Trailmobile Company, the petition in Louis J. Hess v. The Trailer Company. (Defendant's Exhibit 1.)

The answer of the Trailmobile Company in the Louis J. Hess case. (Defendant's Exhibit 2.)

The answer of the C. I. O. in the Louis J. Hess case. (Defendant's Exhibit 3.)

The memorandum opinion of the Court of Common Pleas. (Defendant's Exhibit 4.)

The judgment entry in the Court of Common Pleas. (Defendant's Exhibit 5.)

The decree and entry of affirmance in the Court of Appeals. (Defendant's Exhibit 6.)

October 15, 1945 issue of the Ohio Law Reporter, volume 31, page 51, which shows case number 30392 on the docket of the Supreme Court of Ohio, Louis J. Hess, Appellant, v. The Trailer Company of America et al., Appellees, motion to certify record overruled. (Defendant's Exhibit 7.)

And said papers and pamphlet so offered in evidence, are made parts of this record as Defendant's Exhibits 1 to 7, both numbers inclusive.

And, we will proffer page 61 of the record in the Louis J. Hess case:

Q. Mr. Calhoun, following the dissolution of the Highland plant as of January 1, 1944, the Trailer Company took over [fol. 22] all of the assets as well as the obligations of what was formerly the Highland plant?

A. That's correct.

Q. I believe Mr. Weintraub asked you yesterday any contracts that might have been outstanding in the name of the Highland Body Plant, the Trailer Company is now completing them, is that true?

A. That's correct.

Mr. Harlan: I wish to state that I object to the inclusion of that part of the testimony in the record because the question of res judicata is determined by the issues set forth in the pleadings and by the issues decided by the judgment entry, and not by a miscellaneous portion of the testimony that may or may not have been considered by the Court.

I, Paul Wisenall, Court Reporter, United States District Court for the Southern District of Ohio, Western Division, do hereby certify that the above and foregoing is a true, accurate and complete transcript of the proceedings in the above entitled case, as reported by me in shorthand and transcribed from my notes.

Given under my hand this 24th day of January, 1946.

(S.) Paul Wisenall, Court Reporter, United States District Court, Southern District of Ohio, Western Division.

[fol. 23] PLAINTIFF'S EXHIBIT "A"

Plan of Liquidation

(1) As of the close of business December 31, 1943, the President and Secretary or Assistant Secretary of The Trailer Company of America shall, pursuant to Section 8623-79 of the General Code of Ohio, consent in writing to the dissolution of The Highland Body Manufacturing Company in the name of and on behalf of The Trailer Company of America as the owner of all the outstanding stock of The Highland Body Manufacturing Company, and The

Highland Body Manufacturing Company shall thereupon cease all operations and exist thereafter solely for the purpose of winding up its affairs in accordance with this Plan of Liquidation.

(2) Upon the execution of such written consent to dissolution of The Highland Body Manufacturing Company and as of the close of business December 31, 1943, the President and Secretary or Assistant Secretary of The Highland Body Manufacturing Company shall execute and in due course file with the Secretary of State of Ohio an appropriate Certificate of Dissolution, pursuant to such unanimous consent of all shareholders, and the proper officers of The Highland Body Manufacturing Company shall in due course obtain, execute and file with the proper authorities of the State of Ohio appropriate receipts, certificates, affidavits, tax returns and reports and other appropriate instruments, shall publish and mail the notices required by law and shall do all acts and execute and deliver all papers that may be required fully and finally to dissolve The Highland Body Manufacturing Company.

(3) As of the close of business December 31, 1943, the President or Treasurer of The Highland Body Manufactur- [fol. 24] ing Company shall transfer, assign and deliver all the assets, property, and business, including all tangible and intangible property, patents, rights, licenses, trade names, trademarks, and good will, and generally all assets of every character to The Trailer Company of America, and The Trailer Company of America shall assume and pay all debts, liabilities and obligations of The Highland Body Manufacturing Company, and shall assume and perform all outstanding contracts of The Highland Body Manufacturing Company, and The Trailer Company of America shall upon such distribution of the assets of The Highland Body Manufacturing Company surrender all the outstanding shares of Capital Stock of The Highland Body Manufacturing Company to the President or Treasurer of that company, and said certificates and shares shall be cancelled.

(4) The President or Treasurer of The Highland Body Manufacturing Company shall promptly do and perform all acts necessary or appropriate to the full and complete winding up, liquidation and dissolution of The Highland Body Manufacturing Company, and the proper officers of

The Trailer Company of America shall make a permanent record of this resolution and this Plan of Liquidation and shall in due course file with the corporate federal tax returns a complete statement of all facts pertaining to this complete liquidation, including an appropriate statement showing in detail all transactions incident to or pursuant to this Plan of Liquidation, including also a list of all the properties received upon the distribution, showing the cost or other basis of such properties to The Highland Body Manufacturing Company at the date of distribution and the fair market value of such properties on the date distributed, and including also the statement as to ownership of the shares of stock of The Highland Body Manufacturing Company, showing the number of outstanding shares, per- [fol. 25] centage owned, and voting power of each share; as of the date of adoption of this Plan of Liquidation and as of all times thereafter up to and including the date of adoption and liquidation, and also showing the cost or other basis of the Capital Stock of The Highland Body Manufacturing Company and the proper officers of The Trailer Company of America shall also keep such records and file such additional instruments, lists, statements and other information as may be required by the Commissioner of Internal Revenue.

PLAINTIFF'S EXHIBIT "B"

Bill of Sale

Know All Men by These Presents: That, Whereas, The Highland Body Manufacturing Company, an Ohio corporation, is being completely liquidated and dissolved pursuant to a Plan of Liquidation adopted by The Trailer Company of America, a Delaware corporation, and The Highland Body Manufacturing Company.

Now, Therefore, pursuant to and in consideration of said Plan of Liquidation, The Highland Body Manufacturing Company does hereby sell, assign, and transfer, convey, and deliver unto The Trailer Company of America, its successors and assigns, the following personal property, namely:

All the personal property of any and every kind and nature, tangible and intangible, belonging to or in the pos-

session or control of The Highland Body Manufacturing Company, including, but without limitation, all engines, boilers, machines, and machinery, tools, implements, appliances, apparatus, equipment, tracks, furniture and fixtures, jigs, dies, patterns, drawings, patents, patent rights, trade marks, trade names, licenses, contracts, notes, accounts [fol. 26] and bills receivable, cash on hand in bank, raw materials, materials in process of manufacture, manufactured products, supplies, claims, actions, demands, and rights of action, and all property and rights of any and every description, and business and good will of The Highland Body Manufacturing Company;

To Have and to Hold the same unto The Trailer Company of America, its successors and assigns, absolutely forever, and The Trailer Company of America by acceptance hereof assumes and agrees to pay all liabilities and obligations to perform all contracts of The Highland Body Manufacturing Company.

And The Highland Body Manufacturing Company warrants that it is the lawful owner of all the above property and has full right to sell and transfer the same, that it will warrant and defend the same against all claims and demands whatsoever, and that it will execute and deliver any and all further instruments that may be required fully and completely to transfer all the right, title, and interest of The Highland Body Manufacturing Company in all its property of every character to The Trailer Company of America.

In Witness Whereof, The Highland Body Manufacturing Company has caused its separate name to be hereunto subscribed and its seal to be hereunto affixed by its President thereunto duly authorized by its Board of Directors and all its stockholders this 31st day of December, 1943.

The Highland Body Manufacturing Company, by David R. Calhoun, Jr., President.

Attest: ——, Assistant Secretary.

[fol. 27] State of Ohio,
County of Hamilton, ss:

I, ——, a Notary Public in and for said county and state, do hereby certify that David R. Calhoun, Jr., President of The Highland Body Manufacturing Company, this day acknowledged and declared that he executed the fore-

going Bill of Sale in the name and on behalf of The Highland Body Manufacturing Company, as the free and voluntary act and deed of said corporation, and his free and voluntary act and deed on behalf of said corporation.

Witness my hand and notarial seal this 31st day of December, 1943.

—— ——; Notary Public.

PLAINTIFF'S EXHIBIT "C"

Article 13

All employees of Highland Body Manufacturing Company and The Trailer Company of America, when not working at their respective plants, shall be given preference over all new applicants for jobs in the event either plant is hiring new men. New applicants shall only be given jobs in the event all unemployed men of either of the above plants are offered employment, so far as is consistent to perform the services required. Employees so transferred from one plant to another when called back to the [fol. 28] plant at which they hold seniority, may return as soon as arrangements can be made to replace them without disturbing the operations at either plant, provided, however, that such period does not exceed three (3) days. However, employees at either plant can remove probationary employees when the work is over five (5) days.

Article 14

Section 1. The Departments of Highland Body Manufacturing Company shall be Mill, Light Metal, Heavy Metal, Trim and Cab, Paint, Body, Welders, Yard or (Clean Up) and Miscellaneous, including shippers' helpers, watchmen, licensed firemen, maintenance, stock-keepers and order and receiving clerk.

The Departments of The Trailer Company of America shall be Lay-Out Department, Machine Shop, Riveting Department, Assembly Department, Welding Department, Paint Department, Light Metal, Body Shop and Miscellaneous. (Miscellaneous includes all non-productive labor.) A regular Repair Crew shall be established to consist of the following men: Riveter, Body Builder and Assembler.

Sec. 2. Seniority shall be determined from the last date of hiring. Seniority shall be departmental. Day and night shifts shall be considered one Department, with Departmental seniority ruling throughout entire Department.

Sec. 3. When a reduction in personnel becomes necessary in any department, senior employees in that department shall be retained and no employee shall be required to submit to any reduction in wages, regardless of the operation he is required to perform within his respective departments.

[fol. 29] Sec. 4. All transfers shall be temporary unless otherwise agreed upon by the Management and the Shop Committee.

Sec. 5. Any employee who is to be laid off in his department due to slackening of work shall be given temporary transfer to any department where work is available, unless it is mutually agreed he cannot do the work, retaining his seniority in his own department. He or any other employees of his department so transferred to another department temporarily will retain their departmental seniority among themselves, in the department to which transfer is made, in case of further reduction in personnel or return to their original department.

But any or all employees transferred temporarily shall become the junior to all employees in the department to which transfer is made. Wage rate of employees transferred temporarily to be subject to Article 18, Section 1. When work picks up in the department from which employees were transferred, they shall be returned to their own department according to seniority.

Sec. 6. Any employee may transfer permanently to another department but will become the junior to all employees on the seniority list in the department to which transfer is made. If the transfer is to be permanent the employee shall be given thirty (30) days probation in the new department at his old rate of pay, and if he proves to the satisfaction of the Management and Shop Committee that he can handle the operation, he will then receive the rate of pay of that operation. If the employee is found to be incapable of holding the new job by the Management and Shop Committee at the end of the thirty (30) day probation period, the employee shall be returned to the job

from which he was transferred without loss of seniority in the department from which transfer was made.
[fol. 30] Men making dies, jigs and other special work, requiring special knowledge and experience, may be designated by the Management and Shop Committee without regard to their seniority.

Sec. 7. All transfers from one department to another can become effective only after all employees in line in the department to which such transfers are to be made are called and given opportunity to fill openings.

Sec. 8. Members of Shop Committee shall head the seniority list of their respective departments and at expiration of such term of office shall be returned to their regular place on seniority list.

Article 18

Sec. 2-A. In case of a national crisis, such as a declared or undeclared war, any man who relinquishes his job with the Company for services rendered to the Government, shall on his return to work retain his place on the seniority list with accumulation.

Plaintiff's Exhibit "D"

Article II

Recognition

Section 1. The Company recognizes the Union as the exclusive bargaining agent for all its production and maintenance employees, excluding office and plant clerical employees, technical employees, timekeepers, armed guards, kitchen and cafeteria help, Cab and Mill Departments, superintendents, assistant superintendents, general foremen, foremen, and other supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in all those matters specifically [fol. 31] provided for herein pertaining to wages, hours, and working conditions.

Article VIII

Seniority

Section 1. Seniority, as interpreted in this article, shall be on a plantwide and departmental basis, and shall mean an employee's length of service with the Company. In all cases of increase or decrease of the working force, the principles of seniority as herein set forth shall govern.

Section 2. New employees and others hired after a break in continuity of service will be considered probationary employees until they have worked for the Company 90 days. During this period the Company may transfer, layoff or discharge such probationary employees as it finds necessary and such action shall not constitute a grievance against the Company.

After the 90 day period the employee shall be entered on the seniority list as of his date of employment. All employees of both the day and night shifts shall be entered on the same seniority list.

Section 3. Shift preference shall be on the basis of seniority within the respective departments provided, however, in the opinion of the Company and the Union this preference does not interfere with production.

Section 4. It is understood and agreed that in all cases of increases or decreases of the working force, promotions, transfers, and in the reorganization or consolidation of departments made necessary through changes in manufacturing, seniority shall be given preference by the Company when the occupational qualifications and experience of two or more employees are relatively equal.

Section 5. Employees transferred from one department to another shall hold seniority in the department from [fol. 32] which transferred for a period of thirty (30) working days, after which time all their seniority will accumulate in the new department.

Senior employees, however, who are serving their thirty (30) day period in a department affected by a layoff, shall be laid off only if their accumulated seniority does not entitle them to continue working.

For purposes of seniority the following shall be recognized as departments:

(1) Layout
(2) Machining Department
(3) Axle Department—Sub-Tire
(4) Chassis Assembly
(5) Painting
(6) Light Metal
(7) Body Assembly
(8) Inspection
(9) Maintenance—Sub. Plant House
(10) Stock (Rec. & Truck Drivers)
(11) Service Parts
(12) Welding
(13) Riveting
(14) Shipping
(15) Export Parts

Define Sub Departments: Employees listed under the sub departments will be represented by the representatives of their original departments but will be carried on separate seniority lists.

Section 6. The Company shall furnish the Union with departmental and plantwide seniority lists as soon as possible but no later than thirty (30) days after the signing of this agreement and shall have copies posted on the bulletin boards. Any protests by the Union or any of its members must be filed within fourteen (14) working days after the date of posting or receiving of the lists. In the event that such protests are not filed within this specified time, the seniority lists shall be final. Every six (6) months thereafter, the Company shall prepare revised lists for the Union representatives and they shall be advised weekly of seniority list changes by departments.

[fol. 33] Section 7. When there is a curtailment of work:

(a) Probationary employees shall be the first to be laid off.

(b) The youngest employees in the department or departments affected will be laid off or transferred depending upon their seniority. If they are older that the yougest empolyees in the plant, these youngest plant employees will be laid off and replaced by the employees transferred from the department or departments affected by the curtailment. The oldest employees transferred will have the right to select their jobs from among the vacancies, consistent with their qualifications to perform the work. If any em-

ployee chooses to take a layoff in preference to a transfer, he may do so without affecting his seniority standing in his department.

(c) The Company will consider a reduction to forty (40) hours per week to avoid a general layoff as conditions at the time may warrant. The Shop Committee shall be called in to discuss the reasons before any layoff.

Section 8. When there is an increase of the working force after a layoff:

(a) The reverse of the layoff procedure shall be followed.

(b) Notification of return shall be by registered letter to the last known address of the employee.

Section 9. Employees required for performing the operations of making tools, dies, fixtures, jigs, for taking inventory or for other work of special nature, requiring special knowledge, skill or experience may be selected without regard to seniority or effect upon their seniority.
[fol. 34] In case of overtime work (except inventory) in their regular departments, these employees will not be eligible to exercise their seniority for such overtime work unless they are permanently transferred back to their former department.

Section 10. Employees who have been laid off or whom the Company has failed to recall after a layoff in violation of the seniority provision herein, shall be paid for all time lost.

Section 11. Committeemen and Chief Stewards shall have preference of employment on their respective shifts and in their respective departments during their term of office.

In case a Committeeman or Chief Steward is unable to fulfill a job requirement on overtime work, the oldest capable employee in his department will be used.

Section 12. An employee's seniority shall terminate for the following reasons:

(a) If he quits.

(b) If he is discharged for proper causes.

(c) If he fails to report on schedule following a vacation or an authorized leave of absence without giving satisfactory explanation.

(d) If he engages in gainful employment during a leave of absence, except where such leave of absence has been expressly granted for that purpose.

(e) If he obtains a leave of absence under false pretenses.

(f) If after a layoff he fails to report for work within three (3) working days after his recall (exclusive of Saturdays, Sundays and Holidays). In this event he shall have no recourse if the next man on the seniority list is called, but will be eligible for [fol. 35] next call on seniority list if he has a justifiable excuse for not reporting.

(g) If he is absent for three (3) working days without notifying the Personnel Department or his Foreman.

Article IX

Military Service

Section 1. Employees entering a military, naval or other combat service, or conscripted by the United States in time of war will be considered on a leave of absence and will maintain and accumulate all seniority rights without interruption. Such employees who request reemployment within ninety (90) days after honorable discharge from said service shall be reinstated to the position held by him before entering said service at the current rate of his classification of work; provided, however, that he is physically and mentally able to perform the work satisfactorily. If the position of such an employee has been eliminated, the Company will exert every reasonable effort to provide for the employee employment for which he can satisfactorily qualify.

Section 2. An employee who is or has been inducted into the active service or who in time of war volunteers for the

armed forces and is accepted shall, upon taking leave of absence for such service, receive vacation pay as follows: (1) A full vacation based on average earnings for the previous 12 month period for employees who:

(a) were entitled to and received vacation pay the previous year, and left for military service after January 1 of the current year:

(b) were in the employ of the Company prior to July 1 of the previous year, but were not then entitled [fol. 36] to vacation pay and who did not enter military service until after January 1 of the current year;

(c) have been in the employ of the Company for 12 months immediately prior to entering military service.

(2) A partial week's pay based on the number of months employed by the Company for employees who:

(a) were employed before July 1 of the preceding year, but who did not complete a full year with the Company and who entered military service prior to January 1 of the current year;

(b) were employed between July 1st and October 1 of the preceding year and who entered military service after January 1 of the current year.

[fol. 37] DEFENDANT'S EXHIBIT 1

COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

Case No. A-88735

LOUIS J. HESS, Individually, and as an Employee of The Trailer Company of America, a Corporation, for Himself and for All Other Persons Similarly Situated, 5502 Stewart Avenue, Cincinnati, Ohio, Plaintiff,

v.

THE TRAILER COMPANY OF AMERICA, a Corporation, et al., Defendants

PETITION—Filed 7/17/1944

1. The plaintiff, Louis J. Hess, is an *an* employee of the Trailer Company of America, a corporation, defendant herein, and he brings this action upon his own behalf and

upon behalf of 178 other employees similarly situated (104 of said number now being actually working for said defendant company and the other 74 of said number being employees of the defendant company, but now in the armed forces and services of this Country), the questions and matters to be adjudged and determined being of a common and general interest to him and to all such other employees similarly situated, it being impracticable for them all to be brought before this court as plaintiffs and that [fol. 38] the filing of this action for himself and said other 178 employees similarly situated will avoid a multiplicity of suits. This plaintiff and the other said employees similarly situated will hereinafter be referred to as "plaintiff employees."

2. The defendant, The Trailer Company of America, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is engaged in business at 81st & Robertson Road, Oakley, Cincinnati, Ohio, manufacturing and assembling automobile trailers, drags and kindred mobile units, all of which are being used in the present War effort and are urgently and vitally needed now in order to insure Victory and a successful conclusion of the present War; that said The Trailer Company of America has in its employ approximately 1900 production workers, among them being these plaintiff employees and some other 500 persons now in the armed forces and services of this Country. This defendant is referred to as 'employer' in the contract hereinafter referred to, but in this pleading will hereinafter be referred to as "defendant company."

3. The defendant, International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, is a voluntary unincorporated association consisting of certain employees of the defendant company, but not including these plaintiff employees and other employees not members of said Union and those employees now in the armed forces and services of this Country; that, by virtue of certification by the National Labor Relations Board said Union is the bargaining agent for all the employees of the defendant company except, the employees of the cab and woodworking departments and other employees not material to the determination of this

[fol. 39] cause, and as such did enter into a written contract with the defendant company on June 21st, 1944, which contract covered, among other things, the seniority and terms and conditions of employment of all said employees, including these plaintiff employees, who are within the said bargaining unit so contracted for; that a copy of said contract is hereto attached, made a part hereof the same as if fully re-written herein at length, and marked "Exhibit 'C' "; that Chester Nichols, defendant, is president of the said International Union, United Automobile, Aircraft & Agricultural Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said office; that Willard Schmidt, defendant, is secretary of said International Union, United Automobile, Aircraft & Agricultural Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said office; that George Schneider, defendant, is Chairman of the bargaining committee of said International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said Committee, which has for its functions, among other things, the negotiating of contracts and agreements and the presentation and settlement of grievances. These defendants will all hereinafter be referred to as "defendants UAW-CIO";

4. Plaintiff employees are not members of defendant UAW-CIO Union, but are members of the International Union, United Automobile Workers of America, Affiliated with the American Federation of Labor, Local Union #131; under the contract above referred to they are not required to be, nor are they, members of said defendant UAW-CIO union. This Local Union #131 will hereinafter be referred to as "UAW-AFL";

[fol. 40] 5. Plaintiff employees state that among the terms and conditions of said contract are provisions protecting and guaranteeing the seniority rights of each employee and particularly Section 4, Article VIII, which has been in full force and effect ever since June 21st, 1944, and is still in full force and effect, and is in figures and words as follows:

> "It is understood and agreed that the Employer will, in all cases of increases or decreases of the working force, transfers, or in the event that changes in manu-

facturing makes it necessary to reorganize or consolidate departments, consider the following factors:

Factor A. Length of continuous service with the Employer.

Factor B. Knowledge, training, skill, ability and physical fitness.

When two or more employees are considered by the Employer to be relatively equal under Factor B, then length of continuous service with the Employer shall prevail."

6. Plaintiff employees, numbering said 105 persons now actually working at the defendant company plant, and the 74 said persons employed by the defendant company but now in the armed forces and services of this Country, have seniority and continuous length of service with the defendant company as is set opposite each of their respective names in schedules "A" and "B," which schedules are attached hereto, made a part hereof the same as if fully re-written herein at length;

7. Plaintiff employees state that the defendant company and the defendant UAW-CIO, notwithstanding the contract and agreement guaranteeing the seniority rights of all employees within the bargaining unit covered by said contract, which bargaining unit includes these plain-[fol. 41] tiff employees, set about and planned and are about to carry into execution a plan, scheme and design whereby these plaintiff employees, being superior and senior in seniority and length of service with the defendant company, are to be, and are being, deprived of their individual rights of seniority and to the individual rights and privileges which are theirs by reason of their length of service with the defendant company, in favor of other employees of the defendant company, said other employees being inferior and junior to these plaintiff employees in seniority and length of service with the defendant company, but which other employees or members of the deefndant UAW-CIO union; that the deefndant company and the defendant UAW-CIO have, and are, arbitrarily and in violation of the vested individual rights of these plaintiff employees, setting the individual seniority dates and rights of these plaintiff employees as of January 1st, 1944, whereas in truth and in

fact they have been employed by the defendant company, and their respective individual seniority rights and length of service with the defendant company runs, dates and commences from the respective dates set forth opposite their names on said Schedules or Exhibits "A" and "B," all of which is well known to these defendants and each of them; that under said scheme, plan and design said other employees, who are members of the defendant UAW-CIO union, and who have service or seniority with the company prior to January 1st, 1944, but not the length of service or seniority with the defendant company as that of plaintiff employees are being, and will be, preferred over and above said plaintiff employees and are being given, and will be given, greater seniority status and rights by the defendants to that of the individual vested seniority rights of these plaintiff employees; that to carry [fol. 42] said plan, scheme and design into full force and effect, the defendant company, with full knowledge and consent of the defendant UAW-CIO, and at the instigation and request of said defendant UAW-CIO, has posted on its bulletin boards a list setting forth the respective seniority dates of all its production employees, including these plaintiff employees, which list sets forth the dates of the said 105 plaintiff employees now actually working in the defendant company plants as of January 1st, 1944, and which list entirely omits to grant any seniority to those 74 plaintiff employees now in the armed forces and services of this Country, all of which is illegal, wrongful and contrary to the individual and vested seniority rights of said plaintiff employees and which is known to be so by these defendants, and each of them;

8. Plaintiff employees state that if said plan, scheme and design is actually carried into full force and effect, these plaintiff employees will suffer irreparable damage and injury, in that it will presently and in the future effect and deprive them of valuable seniority rights pre-dating the date of January 1st, 1944 as set by the defendants; that it will seriously hamper, interfere with and impede the present war effort to the irreparable damage, injury and harm of the War effort and those members of our armed forces, both at home and abroad, who are critically in need of the products and articles manufactured and assembled by the defendant company; that it will cause

plaintiff employees to be supplanted and replaced in their jobs and will cause them to be forced to give up their respective jobs by and to other employees who are junior and inferior to them in seniority and length of service with the company; that it will deprive them of the right to be employed at their highest and best skill and thus deprive [fol. 43] them of their right to enjoy and receive higher and better wages and jobs, based upon and in accord with their actual and true seniority rights and length of service with the defendant company; that it will cause them to be shifted about from job to job and shift to shift and will cause them to work on the second or night shift (7 P. M. to 5 A. M.), which shift is less desirable than the first or day shift, the working on shifts being governed by the principles of seniority;

9. Plaintiff employees state that said plan, scheme and design was fostered, spread and sponsored by the defendant UAW-CIO with the sole aim and purpose of preferring members of its organization and union, who are employees of the defendant company and who are inferior and junior in seniority and length of service with the company to that of these plaintiff employees, over and above that of these plaintiff employees, who are all members of the UAW-AFL, and who are superior and senior in length of service and seniority; that said scheme, plan and design has been agreed to by the defendant company and together these defendants are setting about to place same into full and complete force and effect and, unless restrained and enjoined from so doing they will place same into full and complete force and effect, all to the irreparable damage and injury of these plaintiff employees and for which they will have no adequate remedy at all;

10. Plaintiff employees state that the delay caused in giving notice or hearing of a motion or application for a temporary injunction will cause irreparable damage and injury to them and that they have already been deprived of seniority rights and have been ordered by the defendant company to report for the 2nd or night shift of work, commencing at 7 o'clock P. M., Monday, July 17th, 1944, where [fol. 44] employees inferior and junior to them are being preferred to them and are being placed in work on the first or day shift and the failure of these plaintiff employees to

so report to work, unless defendants are restrained and enjoined, will cause them to lose their jobs and to be dismissed by the defendant company.

Wherefore, plaintiff employees pray that the rights of the parties hereto be adjudged, declared and finally determined; that their rights under the contract be adjudged, determined and declared; that it be held, adjudged and decreed that these plaintiff employees are entitled to seniority as of the dates set forth in Exhibits "A" and "B" attached hereto and that the defendants be required to safeguard and protect said seniority as of said dates and to award and grant to plaintiff employees all rights and privileges of employees having seniority or length of service as of said dates; that the agreement and understanding between the defendants setting the seniority of plaintiff employees as of January 1st, 1944 be declared and held to be null and void and of no force and effect and not binding upon any of the parties hereto; that the seniority and rights of plaintiff employees be set and determined as of the respective dates set forth in said Exhibits "A" and "B"; that the seniority list posted by the defendant company be corrected and amended so as to show the dates of hiring of these plaintiff employees as of the dates set forth in said Exhibits "A" and "B" rather than the date of January 1st, 1944 now set forth on said posted list; that pending final determination of this cause a temporary injunction issue, with or without notice, as the Court may deem fit and proper, restraining and enjoining the defendants, and each of them, from in any way planning, scheming or designing or in any way carry- [fol. 45] ing out or into effect any plan, scheme or design depriving these plaintiff employees of their seniority dates as set forth on Exhibits "A" and "B" hereof; that the individual dates of seniority of the plaintiff employees be listed as of the said dates set forth in Exhibits "A" and "B" hereof and that the said posted seniority lists be corrected and amended to show the said dates instead of the date of January 1st, 1944; that upon final hearing said temporary injunction be made final and permanent; that if the Court deem notice necessary before the issuance of a temporary injunction, that the Court then issue a temporary restraining order pending the hearing and application or motion for a temporary injunction and that the defendants be restrained and enjoined as above set forth; for all other

relief which is just, proper and equitable to which they may be found entitled, and for his costs herein expended.

(S.) Morris Weintraub and Peter G. Noll, Attorneys for Plaintiff, PArkway 0527 or HEmlock 6933.

STATE OF OHIO,
County of Hamilton, ss:

Louis J. Hess, of legal age, being first duly cautioned and sworn, deposes and states that he is the plaintiff in the foregoing action; that he brings this action for himself and for all other persons similarly situated; that he has read the facts set forth in the foregoing petition and that same are true.

(S.) Louis J. Hess.

[fol. 46] Sworn to before me and subscribed in my presence by the aforesaid Louis J. Hess this 17th day of July, 1944, (S.) Gurdon W. Wilson, Notary Public in and for Hamilton County, State of Ohio. My commission expires Nov. 15, 1945.

PRAECIPE

To the Clerk:

"Issue summons, directed to the Sheriff of Hamilton County, Ohio, returnable according to law. Endorse: "Action for declaratory judgment; determination and protection of seniority rights of plaintiff and those similarly situated; restraining order, temporary injunction and permanent injunction; all other relief which is just, proper and equitable, and for costs."

Serve the defendants as follows:

The Trailer Company of America, a corporation, by serving its President, David R. Calhoun, Jr., at 31st & Robertson, Oakley, Cincinnati, Ohio;

International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, a voluntary unincorporated association, by serving Chester Nichols, its President, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

Chester Nichols, individually, and as President of International Union, United Automobile, Aircraft &

Agricultural Implement Workers, CIO, Local Union #393, a voluntary unincorporated association, at % [fol. 47] Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

Willard Schmidt, individually, and as Secretary of International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, a voluntary unincorporated association, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

George Schneider, individually, and as Chairman of the bargaining committee of International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union, #392, a voluntary unincorporated association, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio.

Morris Weintraub and Peter G. Noll, Attorneys for Plaintiff, HEmlock 6933 or PArkway 0527.

List of 105 Plaintiff Employees Now Employed and Working

Name	Date of Hiring (Seniority)	Name	Date of Hiring (Seniority)
Albert, Leroy	1-14-35	Grote, Gus	9-25-35
Allen, Louie	7-14-37	Hale, C.	3-14-41
Aston, Owen	6-14-29	Hatter, Orin	3- 8-37
Ball, Ola	7-30-36	Helms, Ralph	6- 2-37
Bergner, Paul	12-14-36	Henderson, George	6-23-39
Bess, Clyde	3-26-41	Hess, Louis	3- 8-37
Brammer, Jess	2-24-41	Hughes, Wm.	10-31-35
Bremmerhause, Fred	-14	Huth, John	6-30-37
Bryant, Ofie	1- 3-35	Johnson, V. I.	8-14-40
Burnett, Clyde	2-27-29	Jones, Ray	10-31-35
Calhoun, Walter	3- 5-35	Jones, Sam	4- 6-37
Cannon, Arthur	3- 2-36	Kephart, Edw.	1-20-41
Carrier, Harry	6- 7-39	Kline, Joe	3-17-41
Cayse, Carl	-42	Knauf, S.	6-28-32
Christopher, Frank	7-29-36	Kopittke, F.	8- 5-35
Clark, David	2-21-38	Lay, Harry	7- 7-37
Crawford, Ray	1-12-38	Luttrell, W.	2- 3-41
Crets, Fred	11- 6-35	McCabe, James	7- 7-37
Deubel, Fred	3- 5-15	Meece, Chas.	5-21-41
DeBord, Leslie	10- 8-35	Melisci, Nick	10- 5-32
Degerman, Albert	4-12-34	Mendell, J. L.	4-21-41
Distler, John	11-13-10	Metcalf, Robert	3-22-26
Duddey, Ray	1-13-38	Meyer, Theo	5-12-33
Earls, Roy	3-26-35	Mills, George	10-24-35
Ellis, Cafe	6-29-29	Mobley, Ernest	2-16-37
Erwin, Greene	9- 9-35	Mobley, R. C.	1- 5-38
Frey, Alfred	3- 5-34	Moore, Nelson	7-25-40
Firth, Alfred	4-23-36	Mullins, Cliff	2- 8-38
Gadberry, Ora	3-17-41	Nichols, Art	4- 2-37
Girdler, Edw.	9-25-35	Nunnelley, Lloyd	2- 6-37
[fol. 48]		Payne, James	10-26-36
Godsey, Ernest	3-24-41	Pearson, Burton	4- 3-35
Graber, W. L.	4-16-36	Ralston, Henry	11-16-36

Ralston, McKinley	7-22-35	Steinborn, Robert	7-19-43
Pflantz, E. J.	7- 6-33	Steins, William	8-19-40
Purden, George	12-20-41	Thoman, Harry	4-28-41
Raidt, Walter	3- 7-35	Tibbetts, Harry	3-15-35
Richmond, Claude, Jr.	12-14-43	Turner, Robert	2- 3-37
Richmond, C., Sr.	2- 2-38	Vaught, Daniel	7-28-36
Roberts, Bradley	5-27-36	Walls, Clinton	11-25-35
Roberts, Fred	7-27-36	Weingartner, J. P.	7-30-36
Rockey, Clyde	9-28-32	Whirls, Johnson	7- 7-37
Schaerges, Cliff	10- 5-32	Whirls, Lawrence	2- 8-35
Schneider, Nick	3-30-36	Wilson, Earl	5-22-36
Scott, John	1-11-25	Williams, Sim	5-24-33
Scully, Dan	12-11-34	Wilson, Lonhie	2- 3-37
Sexton, John	3- 4-38	Wilson, Waldon J.	3-25-41
Shepard, Ray	7- 9-23	Wilson, Woodrow J.	6- 2-37
Simpson, Delmar	1-11-38	Wolf, Carl	6-21-39
Sims, Delbert	4-24-36	Wood, Martie	1-20-41
Smoot, Dewey	10-13-39	Brownlee, H. W.	3- 3-41
Spears, Glance	10-22-26	May, Henry	2-11-37
Stein, Henry	4- 1-36	Birks, Lyle	11-20-35

[fol. 49]

List of 74 Employees Now in the Armed Forces

Name	Date of Hiring (Seniority)	Name	Date of Hiring (Seniority)
Albers, Frank	3-12-36	Hunter, Garland	10- 4-26
Bardill, Robert R.	12-13-38	Inskeep, Raymond	12- 8-36
Baugh, Bert	4-22-35	Jenkins, Robert	3- 6-34
Baugh, Floyd D.	2-26-36	Jones, Francis K.	3- 6-36
Bender, John	10- 6-32	Jones, Paul	10-18-39
Bishop, Elmer A.	10-30-35	Kidd, Howard	4- 1-41
Bowers, Samuel	10-24-39	Lakin, Stanley	11-18-35
Britt, Thomas	4-19-33	Lang, Robert	4- 9-37
Buckley, Stanley Lee	3-25-41	Maddox, Milton	8- 5-36
Burger, Thomas	4- 8-41	Mappes, Roy	5-21-34
Burns, Robert	2-10-38	Masram, Harry	1-11-38
Butz, Ervin	3-20-41	McWharter, Charles	3- 5-41
Byard, Elmer	12- 7-38	Miller, Roy	3-26-38
Casada, Robert	1-19-37	Molloy, James	6- 8-39
Chadwell, Welbie M.	3-12-36	Molloy, Richard	6- 8-39
Cordes, Walter	3-17-41	Nair, Wm.	6-14-39
Coulter, Robert	3-31-41	Neeley, Homer	4-21-41
Cowdrey, Victor	1-17-41	Nichols, Karl C.	3-26-41
Davis, Balum Agie	12- 9-36	Nunnelley, Charles	11-25-35
Douglas, Marcus Ray	3-10-41	Nunnelley, James	1- 5-37
Fair, Stanley C.	5-24-39	Payne, Owen	10-14-36
Farlow, Robert	6-13-39	Rainey, Ernest	1-11-38
Flory, Jos. A.	2-20-41	Roberts, Ancil	6-24-37
French, Elmer	3-29-37	Robinson, Chas. W.	12- 6-38
Frey, Carl	12-15-41	Schultian, Melvin E.	12-20-38
Gagan, John	9- 2-26	Seta, William	12-21-38
Gamm, Jr., Henry A.	10- 8-35	Smith, Elwood	12-28-37
Goodson, Gladys	3- 3-41	Spangler, Orlin	1-11-38
Gover, Frank	3-24-41	Stratton, Paul H.	1-27-41
Hatter, Carlos	10-29-35	Surber, Albert	2-28-41
Heaverin, Ura	3-12-41	Szœke, Frank	2-10-41
Henderer, Arthur C.	12-29-38	Tribbe, Chas. K.	10-15-35
Hensley, Jr., Geo.	1- 4-38	Waddell, Edw.	8- 9-33
Horn, Wm.	3-10-41	Walls, Cecil	4-18-32
Orleck, Lou	5-15-33	Walls, Roy Cleon	1- 6-38
Russell, Burton	1- 7-38	Walstrom, Jack W.	3- 3-41
Wright, Wilmer Carl	6-21-39	Zins, Walter	4- 8-41

[fol. 50] DEFENDANT'S EXHIBIT 2

Answer of the Trailer Company of America, Defendant

1. Defendant, The Trailer Company of America, admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is engaged in business at 31st Street and Robertson Road, Oakley, Cincinnati, Ohio; defendant says that its principal office and place of business are located at said address, and admits that it is engaged in the manufacturing, assembling, sale, and distribution of trailers, drags, and kindred automobile units, all of which are being used in the present War Effort and are urgently and vitally needed now in order to insure Victory and a successful conclusion of the present War; admits that it has in its employ approximately 1900 production workers, among them being the plaintiff Employees as defined in the petition herein, and some other five hundred persons now in the armed forces and services of this country; and admits that it is referred to as "Employer" in the contract alleged in the petition.

2. This defendant says that the United Automobile, Aircraft and Agricultural Implement Workers of America, Local 392, UAW-CIO, hereinafter referred to as the UAW-CIO Union, is a labor organization affiliated with the Congress of Industrial Organizations, and admits to membership employees of this defendant company.

3. This defendant says that the International Union, United Automobile Workers of America, A. F. of L. Local No. 131, hereinafter referred to as UAW-AFL Union, is a labor organization affiliated with the American Federation of Labor, and admits to membership employees of this company.

[fol. 51] 4. Prior to August 6, 1943, the UAW-CIO Union filed with the National Labor Relations Board two separate petitions alleging that questions affecting commerce had arisen concerning the representation of employees of The Trailer Company of America and The Highland Body Manufacturing Company, being cases No. R-5562 and R-5563, which were consolidated and tried together before that board. Then The Highland Body Manufacturing Company was a corporation duly organized and existing under the laws of the State of Ohio and was the wholly-owned and

managed subsidiary of The Trailer Company of America, and the plant of The Highland Body Manufacturing Company was located in Elmwood Place, Cincinnati, Ohio, where it was engaged in the manufacture, sale, and distribution of trailers and also in the manufacture of cabs; then the operations of these two companies were integrated and employees of The Highland Body Manufacturing Company were being permanently transferred to the Oakley plant of The Trailer Company of America and to its payroll and were thereby losing their separate identity; employees of the same skills, performing the same duties for the same employer, were merged in the same respective departments at said Oakley plant. The employees in the cab and woodworking departments of The Highland Body Manufacturing Company were then engaged in the manufacture of wood cabs and after being transferred to said Oakley plant continued in said departments; the physical transfer of machinery and these employees from said Elmwood Place plant to the cab and woodworking departments at the Oakley plant did not result in any intermingling of these employees with the employees previously located at said Oakley plant; the work in the cab and woodworking de- [fol. 52] partments is performed independently of the other departments and the employees in these departments possess skills of a different nature from those of the metal workers in the other departments. The cab department is composed of those employees who were regularly assigned to work on the fourth floor of the Goodall Building at the Oakley plant in assembling cabs; the woodworking department is composed of those employees who are regularly assigned to work on the first floor of the Goodall Building at the Oakley plant and work in lumber in the mill. All remaining employees of both companies, including the watchmen, foremen, plant engineers, and maintenance employees, are intermingled in the other departments in the Oakley plant. Since July, 1940, the employees of this company in both the Elmwood Place plant and the Oakley plant have been represented by one local union in a single industrial unit. On July 1, 1942, the UAW-AFL Union entered into a written contract with The Highland Body Manufacturing Company, of Elmwood Place, Ohio, and The Trailer Company of America located at Oakley, Cincinnati, Ohio, as a result of collective bargaining with that Union. Therein said union was referred to as the "Union", and the

above two companies were referred to as the "Company." This agreement provided for separate bargaining committees in each plant, but otherwise treated the employees of the two companies as a single industrial unit. This agreement further provided:

"Article 14

"Section 2. Seniority shall be determined from the last date of hiring. Seniority shall be departmental. Day and night shifts shall be considered one department, with departmental seniority ruling throughout the entire department."

[fol. 53] "Section 6. Any employee may transfer permanently to another department but will become the junior to all the employees on the seniority list in the department to which transfer is made."

"Article 17

"Section 2. Up to date seniority lists for each department shall be maintained between the company and the shop committee; such lists shall be posted in a conspicuous place where most accessible in all departments."

5. Upon due notice and hearing, on August 6, 1943, the National Labor Relations Board found and issued its decision and direction of election determining that the operations of the two companies constituted jointly an Employer within the meaning of Section 2 (2) of the National Labor Relations Act. It further found and determined that all production and maintenance employees of the companies working at the plants of The Highland Body Manufacturing Company and of The Trailer Company of America, including watchmen, foremen, and plant engineers, but excluding armed guards, Cab Department, and Woodworking Department employees, superintendents, foremen, and any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise affect changes in the status of employees, or effectively recommend such action, constitutes a single appropriate bargaining unit for the purposes of collective bargaining within the meaning of section 9 (b) of the National Labor Relations Act. The National Labor Relations Board therein found and deter-

mined that the employees in the cab and woodworking departments formed an identifiable group at the plant of The Highland Body Manufacturing Company and after transfer [fol. 54] to said Oakley plant would continue to constitute such a group in said Oakley plant. When this decision was issued, the operation of the two companies was in the process of integration, which was fully accomplished prior to January 1, 1944.

6. On December 8, 1943, The National Labor Relations Board rendered its supplemental decision and certification of representatives, certifying to this defendant that the UAW-CIO Union had been designated and selected by a majority of all production and maintenance employees of The Trailer Company of America and The Highland Body Manufacturing Company, both of Cincinnati, Ohio, including watchmen, firemen, and plant engineers, but excluding armed guards, cab department and woodworking department employees as therein defined, superintendents, foremen, and other supervisory employees, with authority to hire, promote, discharge, discipline, or otherwise affect changes in the status of employees or effectively recommend such action, as their representative for the purpose of collective bargaining, and that pursuant to Section 9 (a) of the National Labor Relations Act, the said UAW-CIO Union is the exclusive representative of all such employees for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. On January 3, 1944, negotiations in collective bargaining were started between this company and said UAW-CIO Union.

8. On June 21, 1944, this defendant entered into a written agreement with said UAW-CIO Union; therein this defendant was referred to as the "Employer" and this union was referred to as the "Union." This agreement provides as follows:

[fol. 55] "Article II

Recognition

Section 1. The Employer recognizes the Union as the exclusive representative for the purpose of collec-

tive bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment for all employees in the Employer's plant, but excluding superintendents, assistant superintendents, general foremen, foremen, and all other persons in a supervisory capacity, those employed in Sales, Accounting, Personnel and Industrial Relations Department, all clerical employees, engineers, designers, draftsmen, kitchen and cafeteria help, armed guards and the Cab and Woodworking departments."

"Article III

Union Status

"(a) When a new employee has served thirty (30) working days probationary period from the last date of hiring and it is agreed that he is capable of doing the work for which he was hired, the said employee shall become a member of the Union; furthermore, to be eligible for continuous employment he must remain in continuous good standing in the Union. A member in good standing is a member who has paid all dues, fines and assessments on or before the first day of each month.

"(b) The above clause excludes those employees of the company formerly employed at the Highland Body Plant who were transferred from that Plant to Oakley when their operations ceased at the Highland Plant. They shall be free to decide whether or not they will join the Union. All other present employees of company, covered by this agreement, who are not now serving their 30 day probationary period, referred to [fol. 56] in III (a); shall have thirty (30) days from the date of this contract to become members of the Union in good standing."

"Article VII

Seniority

"Section 1. It is understood and agreed that in all cases of increase or decrease of the working force, the principles of seniority as herein set forth shall govern.

"Section 2. New employees will be considered probationary employees until they have worked for the Employer thirty (30) days. During this period the Employer may transfer, lay off, or discharge such probationary employee as it finds necessary and such action shall not constitute grievance against the Employer.

"After the 30-day working period the employee shall be entered on to the seniority list as of his date of employment. All employees of both day and night shifts shall be entered on the same seniority list.

"Section 3. Representatives of the Union, during their term of office, shall have preference of employment in their respective jurisdiction and at the expiration of their term of office shall cease to have such employment preference. Such preferential employment shall apply only in the case of decreases in the working force of their respective jurisdictions.

"Section 4. It is understood and agreed that the Employer will, in all cases of increases or decreases of the working force, transfers, or in the event that changes in manufacturing makes it necessary to reorganize or consolidate departments, consider the following factors:

Factor A. Length of continuous service with the Employer.

[fol. 57] Factor B. Knowledge, training, skill, ability, and physical fitness.

"When two or more employees are considered by the Employer to be relatively equal under Factor B, then length of continuous service with the Employer shall prevail.

"Section 5. Seniority shall be by departments. Where changes in methods, products, or policies would otherwise require the permanent laying off of employees, the seniority of the displaced employee will become plant-wide and they will be transferred out of their department in line with their seniority to jobs they are capable of doing.

"Departments shall be those divisions of the Plant which are considered by the Employer as a unit of

operation. For the purpose of seniority the departments are as follows:

"(1) Layout
(2) Machining Department
(3) Tire and Axle
(4) Chassis Assembly
(5) Painting
(6) Light Metal
(7) Body Assembly
(8) Inspection
(9) Maintenance
(10) Stock Dept. (including Rec. & Truck Dr.)
(11) Shipping Department
(12) Service Stock
(13) Welding
(14) Riveting
(15) Export Parts Processing

"Section 6. Seniority lists of the employees shall be compiled by the employer. The Employer shall furnish to the Union once each 90 days a corrected copy of the seniority lists, and a like copy shall be posted by the employer on the bulletin boards.

[fol. 58] "Section 7. When there is a curtailment of work:

"(a) Probationary employees shall be the first to be laid off.

"(b) The Employer will consider a reduction in working hours to avoid general layoff as conditions at the time may warrant, and will notify the Union representatives for a discussion of the possibility of reducing working hours to avoid layoff.

"(c) When an employee is transferred from one department to another due to curtailment of work there will be no loss of seniority. Any employee transferred from one department to another will be considered a temporary employee in his new department for a period of 30 days. At the end of 30 days his seniority will be transferred from his former department. Rate of pay for the work assigned will be paid. Employees who decline such work and are laid off shall retain their seniority.

"Section 8. When there is an increase of working force after a layoff:

"(a) The reverse of the layoff procedure shall be followed.

"(b) Before any new employees are hired, employees who are laid off shall be first offered employment in reverse order of their layoff.

"(c) It shall be an employee's prerogative to transfer back into his original department any time an opening occurs, in line with his seniority. Any employee who accepts such transfer to another department and who refuses to return to his original department when his turn comes, automatically becomes a permanent employee of the department to which he was transferred. Then he cannot return to his old department at any future date without first being a temporary employee for 30 days, as pointed out in Section 9(a).

"(d) Notification of return shall be directed in writing to the last known address of the employee, as it appears on the records of the Employer.

[fol. 59] "Section 9. Transfers.

"(a) Any employee may apply for a permanent transfer to another department and upon consideration of Factors A and B, may be so transferred. In the event of such a transfer, the employee shall be given a trial period of thirty days at his old rate of pay, during which time he shall be considered a temporary employee in the new department. If at any time during this trial period, the employee is found incapable of doing the work, he shall be returned to his former department. If the employee proves he can do the work, his full seniority shall be transferred to his new department at the end of his thirty day trial period.

"(b) Permanent transfers from one department to another shall become effective only after all employees of the department to which transfer is to be made are given consideration on basis of Factors A and B by the Employer to fill such openings.

"Section 10. Any employee who has been promoted to a supervisory position shall retain his seniority,

and in the event that he is subsequently transferred to the Bargaining Unit, he will be credited with the seniority he had at the time of transfer plus all seniority accumulated while working in the supervisory capacity.

"Section 11. It is agreed that employees required for making tool dies, jigs, fixtures, for taking inventory, and for any other work of special nature, requiring special knowledge, skill or experience, may be selected without regard to seniority or effect upon their seniority.

"Section 12. Employees who have been laid off, or whom the Company has failed to recall after a layoff in violation of the seniority provisions herein, shall be paid for all time lost.

"Section 13. Employees excluded by Article II, Section 1, shall not perform any work regularly performed by employees covered by this agreement.

[fol. 60] "Section 14. The existing Selective Service Laws, and any changes or amendments which may be made in them by the President or any other duly authorized government agency, governing the seniority rights of returning servicemen, shall be deemed a part of this agreement."

9. This defendant admits that said contract covered, among other things, the seniority and terms and conditions of employment of all its employees, including these plaintiff employees, who are employees of the departments within the said appropriate bargaining unit, which excludes the Cab and Woodworking departments.

10. This defendant admits that the plaintiff employees are not and are not required to be members of the defendant UAW-CIO Union. This defendant says that the plaintiff employees herein are those employees of this defendant who formerly were employed at The Highland Body Manufacturing Company's plant and who were transferred from that plant to the plant of the Company at Oakley, when operations ceased at The Highland Body Manufacturing Company plant.

11. This defendant admits that the copy of said contract attached to the petition and marked Exhibit C is a true

and correct copy of said agreement and admits that said contract has been in full force and effect ever since June 21, 1944, and is still in full force and effect.

12. This defendant says that there are some errors in the two lists of plaintiff employees set forth in the schedules A and B attached to and made a part of the petition herein, that said errors should be corrected as follows:

[fol. 61]

Name of Employee	Date of Hiring Petition States	Correct Date	Remarks
Allen, Louie	7-14-37	10-15-35	
Aston, Owen	6-14-29	6- 4-29	
Calhoun, Walter	3- 5-35	3-12-34	
Cayse, Carl	42	6-19-39	
Kopittke, F.	8- 5-35	8- 5-33	
Lay, Harry	7- 7-37	2-19-39	
Meyer, Theo	5-12-33	6-12-33	
Moore, Nelson	7-25-40	1- 4-38	
Ralston, McKinley	7-22-35	7-22-36	
Purden, George	12-20-41	8-29-39	
Scott, John	1-11-25	1-11-35	
Wharls, Johnson	7- 7-37	12-14-36	
Birks, Lyle	11-20-35		Rehired 4-25-44
Cowdrey, Victor	1-17-41	6-12-39	
Gray, Carl	12-15-41	6-14-39	
Gamm, Jr., Henry A.	10- 8-35	10- 7-35	
Horn, Wm.	3-10-41	3-25-41	
Miller, Roy	3-26-38	3-26-36	
Neeley, Homer	4-21-41	3-10-41	
Nunnelley, James	1- 5-37	1- 6-37	
Roberts, Ancil	6-24-37		Quit 9- 4-43
Surber, Albert	2-28-41		Quit 5-14-43

Schedule A should be further corrected as follows: Roy Earls should be eliminated as he was discharged on June 6, 1944, for excessive absenteeism and is not working and is not an employee of this defendant. Lyle Birks was suspended by the American Federation of Labor Union in November, 1942, because he was no longer in good standing with that Union, and was then discharged under the terms of the union contract with this defendant; he was rehired by this defendant on April 25, 1944. Two names should be added to this schedule A: Robert Jahn, hired February 21, 1938, Joseph Graybeal, hired June 1, 1939.

Schedule B should be corrected by eliminating the names of Garland Hunter, and Milton Maddox, as they are lumber handlers, are not working in the appropriate bargaining unit governed by the contract alleged in the petition, but are employees in the appropriate bargaining unit in-
[fol. 62] cluding the Cab and Woodworking departments.

To Schedule B should be added the following three employees: Eugene Lewsader, hired June 23, 1939; Carlos McGuffey, hired April 15, 1941; and Robert Welsh, hired January 10, 1938.

13. This defendant does not admit that seniority (under the provisions of said contract alleged in the petition) of these plaintiff employees set forth on schedules A and B began with the dates of their respective hiring set forth in said schedules, but denies, for the purpose of this case, that their respective seniorities began on the date of their respective hiring by The Highland Body Manufacturing Company, as this defendant has stated repeatedly to its employees and now again states that it will agree to accept any seniority lists based on continuous length of service in accordance with the contract, upon which its employees can agree.

14. This answering defendant states that it intends to and is attempting to give force and effect to the provisions of said written contract set forth in the petition by assigning its employees within the appropriate bargaining unit covered by said contract, which bargaining unit includes these plaintiff employees, to their jobs in accordance with the seniority of said employees as insisted upon by the duly selected and certified UAW-CIO union, and in accordance with its application of the provisions of the contract to all the facts regarding each respective employee within that appropriate bargaining unit, as this company recognizes this union duly certified by the National Labor Relations Board, and desires to comply with its wishes respecting seniority of the employees this union duly represents under the National Labor Relations Act, including the plaintiff employees, who are in the minority [fol. 63] in this appropriate bargaining unit, and defendant states that it has complied with the wishes of the duly authorized agents of the plaintiff employees regarding their respective seniority rights in accordance with the terms and provisions of the National Labor Relations Act. This defendant denies that it, either alone or in connection with the defendant, UAW-CIO Union, is planning or carrying into execution any plan, scheme, or design for the purpose of depriving plaintiff employees or any of them of their respective seniority rights to jobs as provided in said

contract and denies that it intends to do so. Defendant denies that it is acting arbitrarily and in violation of the seniority rights of these plaintiff employees as defined in said written contract.

15. This defendant admits that it has set the individual seniority dates and rights of these plaintiff employees as of January 1, 1944, and states that it did so in accordance with the request of the UAW-CIO Union as the duly selected and certified agent of plaintiff's employees for the purpose of collective bargaining. This defendant admits that it has posted on its bulletin boards a list, in writing, agreed upon in collective bargaining between this defendant and the UAW-CIO Union as an interpretation and supplement to its contract of June 21, 1944, setting forth the respective seniority dates of all its production employees, including these plaintiff employees, and admits that such list sets forth the dates the said plaintiff employees now actually working at its Oakley plant as of January 1, 1944, and that said list gives the same seniority to the plaintiff employees now in the armed forces and services of this country.

16. This defendant denies that the above is illegal, wrongful, or contrary to any individual and fixed senior- [fol. 64] ity rights of said plaintiff employees, it says that the acts of this defendant have been in accordance with the terms of said written contract, as interpreted and supplemented by the agreed seniority list, with the wishes of the duly constituted agent of plaintiff employees, and with the duties of this defendant in continuous collective bargaining under the National Labor Relations Act.

17. This defendant admits that, unless restrained by this court from doing so, it will continue to so assign jobs in accordance with the seniority rights of its employees as set forth on said seniority list and as above set forth.

18. This defendant admits that it ordered plaintiff employees to report for the second or night shift of work, commencing at seven P. M., Monday, July 17, 1944, but denies that these plaintiff employees thereby were deprived of any of their former seniority rights, except as their duly constituted collective bargaining agent agreed on their behalf, as above stated.

19. This defendant further denies each and every allegation in the petition contained, not hereinbefore specifically admitted to be true.

Wherefore, The Trailer Company of America, defendant herein, prays that the rights of the parties hereto, plaintiffs and defendants, be adjudged, declared, and finally determined by this court; that their rights under the contract be adjudged, declared, and determined by this court; that the seniority rights of each of its employees be adjudged, declared, and finally determined by this court; this defendant also prays that the court refuse to issue any temporary or permanent injunction [fol. 65] against this defendant, and that it recover from the plaintiff its costs herein incurred.

——— ———, Attorneys for the Defendant, The Trailer Company of America.

STATE OF OHIO,
Hamilton County, ss:

David R. Calhoun, Jr., being first duly sworn, deposes and says that he is President of The Trailer Company of America, a Delaware corporation, one of the defendants in the above-entitled action, and that the facts stated in the foregoing answer are true as he verily believes.

——— ———.

Sworn to before me and subscribed in my presence, this 20th day of July, 1944. ——— ———, Notary Public in and for Hamilton County, Ohio.

DEFENDANT'S EXHIBIT 3

Answer of International Union, United Automobile, Aircraft, Agricultural, Implement Workers of America (UAW-CIO) Local Union #392, et al.

Come now the defendants, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO) Local Union #392, improperly [fol. 66] named in the petition as International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, and Chester Nichols, Willard Schmidt and George Schneider, individually and

as officers in the union, and for Answer to the Petition deny that this Court has jurisdiction over the matters and issues raised in the petition. It appearing from the face of the Petition that this defendant union was certified by the National Labor Relations Board as the bargaining agent for all the employees in the Trailer Company of America, complaints of individual employees must be taken up in accordance with the provisions of the National Labor Relations Act, (49 Statutes, 449), under Section 10, of said act, exclusive jurisdiction is given by Federal Law to said board, and this Court therefore has no jurisdiction in this matter.

Second Defense

For a second defense, and if the Court determines that it has jurisdiction in this mater, then these defendants state that defendant union as bargaining agent represented plaintiffs and all other employees, whether members of the defendant union or not, and bargained and negotiated with the defendant employer from January 3rd, 1944 to date for the purpose of agreeing on a contract; that certain of the items in the contract could not be agreed upon and by designation of the War Labor Board, Rt. Rev. Monsignor Marcellus Wagner was designated as a hearing officer, at which time all disputed questions were heard and submitted to him, and his opinion thereafter issued, was duly approved by the Regional War Labor Board, that following said opinion and approval thereof, a written contract was entered into on June 21st, and as part and parcel of, said [fol. 67] contract, a seniority list was agreed upon by the defendant employer and the defendant union; and that in said list plaintiff and those on whose behalf he seeks to bring this suit were placed on the seniority list as of January 1st, 1944, that being the date when their employment terminated with the Highland Body Manufacturing Company, and when their employment commenced with the defendant employer herein.

These defendants state that said contract of June 21st, 1944 and the seniority list prepared shortly thereafter were the results of the bargaining and negotiations between the defendant union as the agent for his employees certified by the National Labor Relations Board and the defendant employer, that said contract is in full force and effect.

Third Defense

For a third defense, defendants deny each and every allegation contained in the Petition other than those setting forth facts which are contained in the herein Answer.

Wherefore, having fully answered, defendants pray that the Petition herein be dismissed and that they may go hence without day, and with their costs herein expended.

Sol Goodman, Attorney for Defendants.

STATE OF OHIO,
Hamilton County, ss.:

George Schneider, being first duly cautioned and sworn states that he is the Chairman of the Bargaining Committee of the defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO), Local Union #392, et al. one of the defendants herein, and that he is one of the defendants herein, and [fol. 68] that the facts and allegations contained herein above are true to the best of his knowledge and belief.

_____

Sworn to before me and subscribed in my presence this —— day of ——, 1944. —— ——, Notary Public, Hamilton County, Ohio.

DEFENDANT'S EXHIBIT 4

31 O. O. 566, also Vol. 31 O. L. R. 566 Dec. 10, 1945 issue.

DEFENDANT'S EXHIBIT 5

Judgment Entry

This day this cause came on to be heard on the pleadings, testimony and evidence and was submitted to the court.

Upon consideration the court finds on the issues joined in favor of the defendant and coming on to declare the rights of the plaintiff and those on whose behalf this action is instituted, the court finds:

1. The defendant Union and the defendant Company had a legal right to enter into a contract fixing the seniority

dates and rights of plaintiff's employees as of January 1st, 1944.

2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights can not arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

[fol. 69] 3. The fact that the National Labor Relations Board recognized the Trailer Company of America and the Highland Body Manufacturing Company as a single employer and permitted the election of an exclusive bargaining agent for all such employees does not automatically require the defendant Union as bargaining agent to disregard the separate corporate legal entities of the two corporations and compel the bargaining agent to consider the two corporations as one.

4. The court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944 acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought.

5. The court further declares that it is not empowered to contract for the plaintiff or make a new contract "that power exists only in the exclusive bargaining agent under the provisions of the National Labor Relations Act so long as that agent acts within the law.

It is, therefore, ordered, adjudged and decreed that the petition herein be dismissed at the costs of the plaintiff. To all of which plaintiff excepts.

[fol. 70] DEFENDANT'S EXHIBIT 6

COURT OF APPEALS, HAMILTON COUNTY, OHIO

No. 6503

LOUIS J. HESS, et al., Plaintiff-Appellant,

v.

THE TRAILER COMPANY OF AMERICA, a Corporation, et al., Defendants-Appellees

Decree and Entry of Affirmance

This cause came on to be heard on the notice of appeal on questions of law and on questions of law and fact, upon the transcript of evidence and on briefs and arguments of counsel and was submitted to the court.

Upon consideration the court finds that there should be entered herein a decree similar to the decree made by the lower court.

Upon consideration hereof the court finds on the issues joined in favor of the defendants-appellees and coming on to declare all the rights of the plaintiff-appellant and those on whose behalf this action was instituted, the court finds:

1. The defendant Union and the defendant Company had a legal right to enter into a contract fixing the seniority dates and rights of plaintiff employees as of January 1st, 1944.

[fol. 71] 2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights cannot arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

3. The fact that the National Labor Relations Board recognized the Trailer Company of America and the Highland Body Manufacturing Company as a single employer and permitted the election of an exclusive bargaining agent for all such employees does not automatically require the defendant Union as bargaining agent to disregard the separate corporate legal entities of the two corporations

and compel the bargaining agent to consider the two corporations as one.

4. The Court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944 acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought.

5. The court further declares that it is not empowered to contract for the plaintiff or make a new contract "That power exists only in the exclusive bargaining agent under the provisions of the National Labor Relations Act so long as that agent acts within the law."

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be and the same hereby is affirmed and that the petition be dismissed at the costs of the plaintiff-appellant.

[fol. 72] The court finding that there was reasonable grounds for appeal, assesses no penalty. To all of which plaintiff-appellant excepts.

DEFENDANT'S EXHIBIT 7

See Vol. 31 O. L. R., page 51, October 15, 1945, issue.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted].

COMPLAINT—Filed September 18, 1945

I

The Trailmobile Company is now, and was at all times hereinafter mentioned, a corporation duly incorporated and organized under the laws of the State of Delaware and engaged in business in Ohio with its office and principal place of business in Cincinnati, Ohio.

II

Plaintiff is a discharged veteran from the armed forces of the United States having entered the service on October 23, 1942, and having received an honorable discharge from said service and otherwise qualified for reemployment at the time of his discharge as aforesaid.

[fol. 74]

III

For many years prior to January 1, 1944, defendant, The Trailmobile Company, and The Highland Body Manufacturing Company were engaged in Cincinnati, Ohio, in the manufacture of trailers, semi-trailers, and cabs for automobile trucks, the two companies both being employed in the manufacture of the same or similar commodities, and the stock in both companies being held by the same individuals, and the same Board of Directors and executive officers administering and managing the affairs of both companies.

IV

During the year 1943 the directors and executive officers of the two corporations aforesaid, in carrying out a policy of uniting the operations of these two companies, removed from the plant of The Highland Body Manufacturing Company all of the tools, equipment and supplies of the said The Highland Body Manufacturing Company to the premises of The Trailmobile Company and transferred the employees of said The Highland Body Manufacturing Company to the premises of The Trailmobile Company.

V

On January 1, 1944, said transfer of employees and physical equipment having been completed, the absorption of The Highland Body Manufacturing Company into The Trailmobile Company was submitted to the stockholders of both corporations and said absorption approved, and by the plan duly adopted, it was agreed that The Trailmobile Company "shall assume and pay all debts, liabilities and obligations of The Highland Body Manufacturing Company and shall assume and perform all outstanding [fol. 75] contracts of The Highland Body Manufacturing Company."

VI

Plaintiff says that on or about the 8th day of February, 1935, he entered the employ of The Highland Body Manufacturing Company and remained in said employ until he entered the military service of the United States on October 23, 1942, as aforesaid; that while employed by The Highland Body Manufacturing Company he worked under a number of employment contracts entered into by the bargaining agent of all the employees of said company with the representatives of The Highland Body Manufacturing Company, whereby it was provided as follows: "seniority shall be determined from the last date of hiring; seniority shall be departmental; night and day shifts shall be considered one department with departmental seniority ruling throughout the entire department."

The above provision was included in the contract entered into as aforesaid on July 1, 1942, and was in full force and effect between plaintiff and The Highland Body Manufacturing Company on the date that plaintiff left the employ of The Highland Body Manufacturing Company and entered military service as aforesaid.

VII

Plaintiff further says that he returned from service and was employed by The Highland Body Manufacturing Company May 3, 1943, and was restored to his former position as painter in the Painting Department, and to all privileges arising out of seniority therein.

Plaintiff further says that on or about July 15, 1944, in violation of his seniority rights, he was notified by the defendant, The Trailmobile Company, that his seniority [fol. 76] rights as a former employee of The Highland Body Manufacturing Company would date from January 1, 1944, the date of the absorption of The Highland Body Manufacturing Company by The Trailmobile Company.

VIII

Thereafter, defendant herein again restored plaintiff to his date of hiring, as regulating his seniority, to-wit: February 8, 1935, pursuant to a directive of the Selective Service System of the United States, and he continued to benefit by such seniority status until on or about September 3, 1945, at which time the defendant herein, in

violation of said seniority status, transferred this plaintiff from his position in the Painting Department, in which Department he had the highest seniority and in which Department he was drawing a pay of $1.05 per hour, to the Stock Department where defendant herein threatens to and will, unless restrained by this Court, reduce his pay to $0.83 per hour and materially reduce his seniority rating based upon a fictitious employment date of January 1, 1944.

By reason of the aforesaid, plaintiff has been deprived of his seniority rights, fixed and established as hereinbefore set forth by the contract between The Highland Body Manufacturing Company and its employees, including this plaintiff, and also, this plaintiff has been deprived of his statutory rights to seniority as granted by Section 308, Title 50, of the laws adopted by the Congress of the United States and published in the United States Code Annotated, known as The Selective Training and Service Act, as amended. By reason of the foregoing, the acts of the defendant herein have irreparably damaged this plaintiff for which he has no adequate remedy at law.

[fol. 77] Wherefore, this plaintiff prays that defendant herein be temporarily restrained from reducing the pay of plaintiff below $1.05 per hour and from charging the seniority status of plaintiff to the control date of January 1, 1944, and that a mandatory injunction be directed to defendant herein requiring this defendant to reinstate plaintiff in his former position in the Painting Department operated by this defendant and to grant to this plaintiff all rights heretofore taken from him without loss of his seniority, and for such other and further relief as he may be entitled to in equity.

(S.) Byron B. Harlan, United States Attorney, Room 722, United States Court House and Post Office, Cincinnati, Ohio.

Duly sworn to by Lawrence Whirls. Jurat omitted in printing.

[fol. 78] IN UNITED STATES DISTRICT COURT

INTERVENING PETITION OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO LOCAL 392—Filed October 2, 1945.

Comes now intervening petitioner, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW CIO Local 392, and having heretofore been made a party defendant herein for answer to the complaint states:

1. It generally denies each and every allegation contained in the complaint excepting only such allegations as are hereinafter set forth.

2. This defendant states that all matters herein have been fully adjudicated in the case wherein Louis J. Hess, individually and as an employee of the Trailer Company of America for himself and for all other persons similarly situated was plaintiff and the defendant herein was defendant, being cause No. A-88735 in the Court of Common Pleas of Hamilton County, Ohio which judgment was affirmed in case No. 6503 in the Court of Appeals of Ohio and a motion to certify said case is now (bearing No. [fol. 79] 30392) in the Supreme Court of Ohio. Said adjudication and said case disposes of issues herein involved and is binding upon the plaintiff herein and upon the court in the present controversy.

3. For a third defense this defendant states that said complaint should be dismissed on the grounds that it shows on the face thereof that plaintiff has no cause of action.

Wherefore, having fully answered, this defendant prays the court for an order dismissing the complaint herein and that it may go hence without day and with its costs herein expended.

(S.) Sol Goodman, Attorney for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW CIO, Local 392.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 15, 1945

First Defense

Defendant, The Trailmobile Company, for answer to the complaint filed herein, admits the allegations of the following numbered paragraphs, No. I, II, III, IV, V, paragraph 1 of VII.

This defendant denies the allegations of paragraph VI, paragraph two of VII, VIII. Defendant denies each and every allegation in the complaint contained not herein expressly admitted to be true.

[fol. 80] Second Defense

Defendant, The Trailmobile Company, re-incorporates, re-iterates, and re-alleges all of the allegations in the First Defense herein contained as if expressly rewritten herein.

Further answering, this defendant says that plaintiff was employed by the Highland Body Manufacturing Company on or about the 8th day of February, 1935, and continued such employment until October 23, 1942, when plaintiff then entered the military service of the United States; that on May 3, 1943, he was re-employed by the Highland Body Manufacturing Company after having been discharged from said United States military service, and was re-employed in the paint department, where he had previously worked. Thereafter, an election was ordered by the National Labor Relations Board pursuant to law and plaintiff was one of those employees permitted to vote in the election for collective bargaining representative pursuant to the National Labor Relations Act. By a majority vote of the employees so permitted to vote in the election, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, was duly elected the collective bargaining representative for all of the employees, including this plaintiff.

During the year 1943 he, along with other employees, was moved from the Elmwood Place plant of the Highland Body Manufacturing Company to The Trailmobile plant in Oakley, Cincinnati, Ohio. However, he was continued on the payroll of the Highland Body Manufacturing Company until December 31, 1943. As of January 1, 1944, said

The Highland Body Manufacturing Company was legally dissolved and plaintiff was then employed by The Trail-
[fol. 81] mobile Company (then the Trailer Company of America) and thereafter he received his pay from said The Trailmobile Company.

No contract was made by this defendant with the employees through their collective bargaining agent with reference to the seniority status of former Highland Body Manufacturing Company employees until July, 1944, when, pursuant to a War Labor Board affirmance of an arbitration finding, the collective bargaining agency fixed the seniority rights of former Highland employees as of January 1, 1944, the date said Highland employees were transferred to the pay-roll of the Trailmobile Company.

This defendant denies that plaintiff had any seniority rights with The Trailmobile Company prior to January 1, 1944. This defendant further says that the matters herein disputed relative to the corporate identities of The Highland Body Manufacturing Company and the Trailmobile Company, and with reference to the seniority status of the employees of the former Highland Body Manufacturing Company have been finally adjudicated by the Supreme Court of Ohio in case No. 30392, on the docket of said court. In said suit, now finally determined by said The Supreme Court of the State of Ohio (October 15, 1945, Ohio Law Reporter 51), plaintiff therein filed said action on his own behalf and on behalf of 178 other employees similarly situated, one of whom was this plaintiff, although not specifically named therein. Said suit by Louis J. Hess was filed in the Court of Common Pleas, Hamilton County, Ohio, and was duly numbered A-88735, duly filed on July 17, 1944, while this plaintiff was employed by The Trailmobile Company. Although this plaintiff had full knowledge of said suit, he
[fol. 82] failed to enter any appearance or objection or denial of the issues therein involved.

Defendant further says that the issues therein adjudicated disposed of the issues herein involved, and said adjudication is binding upon the plaintiff herein and upon this court, and that the issues so determined by a court of last resort of the State of Ohio are res judicata to the issues herein involved.

Third Defense

Defendant, The Trailmobile Company, says that plaintiff returned to work after being discharged from the military service of the United States on May 3, 1943, and that this action was not filed in the United States District Court or any other court until September 18, 1945, more than one year after the re-employment of defendant herein, and that plaintiff has not been deprived of any rights granted by Section 308, Title 50, of the laws adopted by the Congress of the United States and published in the United States Code, Annotated, known as the Selective Service and Training Act as amended.

Fourth Defense

Defendant, The Trailmobile Company, further says that United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, was the duly elected and qualified bargaining agent for all of the employees of The Trailmobile Company, including this plaintiff, and was so certified by the National Labor Relations Board; that as a condition of employment plaintiff is required to be a member of United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, and that plaintiff is and was at the time of filing this complaint a member of said union; that said union in [fol. 83] July, 1944, and again in July, 1945, entered into contracts with this defendant, The Trailmobile Company, and that, pursuant to said contracts and the seniority rights granted therein and thereunder, this plaintiff was given seniority as of January 1, 1944. This defendant further says that matters of seniority for all of the employees were determined by the Union and its membership including this plaintiff, and that this defendant, by reason thereof, granted this plaintiff seniority as of January 1, 1944, and that this defendant had no alternative other than to act accordingly; that plaintiff, as a member of said Union representing all of the employees of said plant, has only such rights and remedies as are given him by the union and by virtue of his membership therein.

Wherefore, having fully answered, the defendant, The Trailmobile Company, prays that the complaint filed herein

be dismissed, and that it be ordered to go hence without day, and recover from plaintiff its costs herein expended.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Defendant, The Trailmobile Company.

Duly sworn to by Wade T. Childress. Jurat omitted in printing.

[fol. 84] Copy mailed to Sol Goodman, Counsel for Union; Byron Harlan, Counsel for Plaintiff.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed December 18, 1945

FINDINGS OF FACT

The Highland Body Manufacturing Company and The Trailmobile Company were two corporations manufacturing the same commodities in two separate plants in different parts of Cincinnati, Ohio. The Highland Body Manufacturing Company was a wholly owned subsidiary of The Trailmobile Company and had the same executive officers. During 1943 the supplies, equipment and personnel of The Highland Body Manufacturing Company were transferred to the plant of The Trailmobile Company, and a plan of consolidation of the two companies was executed, whereby The Trailmobile Company took over the assets and going business of The Highland Manufacturing Company and agreed to assume, pay and carry out all obligations of The Highland Body Manufacturing Company. A bill of sale was executed from The Highland Body Manufacturing Com- [fol. 85] pany to The Trailmobile Company. The transaction was effective on January 1, 1944, and the employees of the Highland Body Manufacturing Company were then transferred to the payroll of The Trailmobile Company. On the last full year of independent operation, 1942, The Highland Body Manufacturing Company had roughly one hundred employees and produced commodities worth one and one-half million dollars, while The Trailmobile Company had one thousand employees and produced commodities worth twelve million dollars.

The employees of both companies, prior to the consolidation, were affiliated with the A. F. of L. A controversy arose as to the seniority rights of the employees of The Highland Body Manufacturing Company after the consolidation, which controversy was submitted to the national representatives of the American Federation of Labor, and by that body it was decided that all employees of both companies should rate seniority under the consolidation directly as of the date they had individually been employed by their respective companies. The employees of The Trailmobile Company then re-organized and united with the C. I. O. and elected a bargaining agent for all of the employees to negotiate a labor contract with The Trailmobile Company. This labor contract was negotiated about July 1, 1944, and fixed the seniority rights of The Highland Body Manufacturing Company employees, regardless of their date of employment, as of January 1, 1944. This bargaining agreement also provided that within one year all employees must necessarily become affiliated with the C. I. O. Union.

One Mr. Hess, a former employee of The Highland Body Manufacturing Company, for himself and the other former Highland employees, including this plaintiff by name, in-[fol. 86] stituted a suit in the state courts to enjoin the C. I. O. Union and The Trailmobile Company from carrying out the seniority provisions of the new employment agreement, so far as imposing the seniority date of January 1, 1944, upon the Highland employees is concerned. The basis of his claim was that under the National Labor Relations Act, an employment agreement whereby the employees' agent bartered away the established rights of a minority of the employees for the benefit of the majority, was prohibited. The Hess suit was determined in the Common Pleas Court adversely to the Highland employees. This decision was approved by the Circuit Court of Appeals, and on attempted certiorari to the Ohio Supreme Court, that court refused to review the case.

Lawrence Whirls entered the employment of The Highland Body Manufacturing Company in 1935. He entered the military service of the United States in 1942, and returned to his employment in May of 1943, as an employee of The Highland Body Manufacturing Company. His seniority, status and pay were not reduced by the Highland Body Manufacturing Company and were not affected until the negotiations of the working agreement in July of 1944.

At that time his seniority was reduced to the status of January 1, 1944, along with all other Highland Body Manufacturing Company employees.

Complying with the closed shop provision of the employment agreement, Whirls joined the U. A. W.-C. I. O. in June of 1945. His reduction in seniority occurred fourteen months after he returned to his employment.

Conclusions of Law

The Court's conclusions of law based upon the foregoing facts are as follows:

[fol. 87] 1. The case of Hess v. The Trailmobile Company does not control the issues in the case at bar. There was no provision in the National Labor Relations Act which was involved in the Hess case which attempted in any way to confer seniority rights of any employees. The Hess case was a class suit and was determinative of the law as applying to the facts which pertained to each member of the class involved. It did not determine Whirls' rights as a veteran under the Selective Training and Service Act for the reason that that act was neither pleaded nor mentioned in the judgment entry of said cause and also because a number of the Highland employees were not veterans.

2. The fact that the plaintiff is a member of the C. I. O.-U. A. W., Local 392, which organization selects the bargaining agent for the employees of The Trailmobile Company, does not preclude this plaintiff from applying to the courts to protect his individual rights in his relationships with his employer. Such membership could only affect the relationship of Whirls to his union and the rights and obligations growing out of that membership. It could not affect Whirls' rights against third parties, at least so far as to preclude him from appealing to the courts for what he conceived to be transgression of those rights.

3. The Court finds that The Trailmobile Company, as it now exists after the complete absorption of its former subsidiary, The Highland Body Manufacturing Company, is under the plan of consolidation obliged to carry out and fulfill all of the contracts and obligations of The Highland Body Manufacturing Company. The court further finds that the seniority status of plaintiff Whirls upon his return

to The Highland Body Manufacturing Company after [fol. 88] leaving military service, under the provisions of the Selective Training and Service Act, became a contractual right vested in Whirls against the Highland Body Manufacturing Company and therefore became a right which Whirls continued to hold against The Trailmobile Company after consolidation so long as Whirls was employed by The Trailmobile Company and the provisions of the Selective Training and Service Act continue in force as they are at the date of this decision.

4. The seniority rights of a returning veteran employee are fixed in that employee as of the date he entered the military service of the United States. His seniority rights accumulate during his military leave, his legally authorized furlough after discharge and his first year of reemployment. They continue to be fixed without loss under the existing Selective Training and Service Act so long as that act remains in its present form. The provision of Paragraph 8 (c), Section 308, of the Act that the reemployed veteran shall not be "discharged from such position without cause within one year of such restoration" is not a limitation upon the length of time that the returned veteran employee shall enjoy his pre-service seniority rights. It is merely a provision that in addition to the rights which his ordinary seniority give him he is entitled to employment during the first year even over those non-veteran employees who have seniority superior to that of the returned veteran. The Court finds that it was the intention of Congress that during the first year of the veteran's return to his employment he should be entitled to his former employment as long as his employer is in business and as long as such reemployment is not impossible or unreasonable, even though such reemployment involves the discharge of former civilian [fol. 89] employees who have seniority rights higher than that of the returned veteran. The court finds that this right, which might be called super-seniority, lasts for only one year's time and that after the year's time the veteran enjoys his pre-service seniority on a par with all other employees.

John H. Duffel, Judge, United States District Court.

In United States District Court

Judgment—Filed December 20, 1945

This cause coming on to be heard on the pleadings and the agreed statement of facts, together with the exhibits, the arguments and briefs of counsel;

On consideration whereof, the Court has heretofore found for the plaintiff and against the defendant, and further, that plaintiff is entitled to a restoration of his seniority status among the employees of The Trailmobile Company as such seniority status existed prior to his entry into the military service, and that, therefore, he is entitled to seniority as of date of hiring with The Highland Body Manufacturing Company, to wit: February 8, 1935.

It Is Therefore Ordered that The Trailmobile Company reinstate the seniority of plaintiff as of February 8, 1935, and cancel the present seniority status as of January 1, 1944, to all of which counsel for defendant excepts. Defendants to pay costs.

John H. Druffel, Judge, United States District Court.

[fol. 90] (S.) Byron B. Harlan, U. S. Attorney, Attorney for Plaintiff; (S.) Waite, Schindel & Bayless, Philip J. Schneider, Waite, Schindel & Bayless, Attorney for Defendant; Sol Goodman, Attorney for U. A. W.-C. I. O., Local 392.

In United States District Court

Notice of Appeal of Defendant, U. A. W.-C. I. O.—Filed January 12, 1946

The defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, U. A. W.-C. I. O., Local 390, hereby give notice of appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision and judgment of the United States District Court entered in the within case on December 20th, 1945 wherein the court entered judgment for the plaintiff.

Sol Goodman, Attorney for Defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, U. A. W.-C. I. O.

[fol. 91] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY DEFENDANT, THE TRAILMOBILE COMPANY—Filed January 17, 1946

The defendant, The Trailmobile Company, hereby gives its Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision and judgment of the United States District Court, entered in the within case on December 20, 1945, wherein the Court entered judgment for the plaintiff.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Defendant, The Trailmobile Company.

Copy of the above notice served on U. S. District Attorney, Counsel for Plaintiff, this 17th day of January, 1946.

Copy of the above notice served on Counsel for International Union, United Automobile, Aircraft, Agricultural Workers of America, UAW-CIO, Local 390, this 17th day of January, 1946.

Copies this 17th day of January, 1946, were served by the undersigned attorney, upon attorney for International Union and upon the U. S. Attorney.

Edw. L. Douglass, Jr.

[fol. 92] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed January 25, 1946

It is stipulated by and between the parties that, pursuant to Rule 15(5) of this Court the parties file this as the designation of the record herein to be contained in the printed record.

1. The Transcript of the Testimony.
2. Government's Exhibit A, Plan of Liquidation.
3. Government's Exhibit B, Bill of Sale.
4. Government's Exhibit C, Union Contract, 1940-1942, Articles XIII, XIV, and XVIII, Section 2-a.
5. Government's Exhibit D, Union Contract, 1945, Article II, Section 1, Articles VIII, IX.
6. Defendant, The Trailmobile Company's Exhibit No. 1, Petition in Hess v. The Trailer Company of America.

7. Defendant, The Trailmobile Company's Exhibit No. 2, Answer of The Trailer Company of America in Hess v. The Trailer Company of America.

8. Defendant, The Trailmobile Company's, Exhibit No. 3, Answer of UAW-CIO in Hess v. The Trailer Company of America.

9. Defendant, The Trailmobile Company's, Exhibit No. 4, Memorandum Opinion in Hess v. The Trailer Company of America published in 31 O. O. 566, also in Volume 31, O. L. R. 566, December 10, 1945 issue. (Opinion not to be printed in record.)

10. Defendant, The Trailmobile Company's, Exhibit No. 5, The Judgment Entry in Hess v. The Trailer Company of America.

11. Defendant, The Trailmobile Company's, Exhibit No. 6, Decree and Entry of Affirmance.

[fol. 93] 12. Defendant, The Trailmobile Company's, Exhibit No. 7, Supreme Court Decision overruling motion to certify record in Hess v. The Trailer Company of America, reported in Volume 31, O. L. R., page 51, October 15, 1945, issue. (Page of Ohio Law Reporter not to be printed in record.)

Pleadings

13. Complaint.
14. Intervening Petition of UAW-CIO.
15. Answer of The Trailmobile Company.
16. Findings of Fact and Conclusions of Law.
17. Judgment Entry.
18. Notice of Appeal of UAW-CIO.
19. Notice of Appeal of The Trailmobile Company.
20. Designation of Record.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for The Trailmobile Company; Sol Goodman, Attorney for UAW-CIO; Byron B. Harlan, United States District Attorney; by Frederic W. Johnson, Assistant U. S. District Attorney.

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—February 12, 1946

(Before Simons, Martin and Miller, JJ.)

This cause is argued by Philip J. Schneider for The Trailmobile Company; by Sol Goodman for the C. I. O., and by Byron B. Harlan for Whirls, and is submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Entered April 5, 1946

Appeal from the District Court of the United States for the Southern District of Ohio

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 10189

THE TRAILMOBILE COMPANY, et al., Appellants,

v.

LAWRENCE WHIRLS, Appellee

Appeal from the United States District Court for the Southern District of Ohio

OPINION—Filed April 5, 1946

Before Simons, Martin and Miller, Circuit Judges

MARTIN, Circuit Judge:

Decision of this case requires interpretation of the re-employment provisions of the Selective Training and Service Act of 1940: 54 Stat. 855, U. S. C. A., Title 50, Sec. 301,

et seq., and especially Sec. 308 thereof, as amended. The Act provides that the honorably discharged service man, who, in order to perform training and service by induction into the land or naval forces of the United States, left a permanent position with a private employer, shall, if still qualified to perform the duties of the position, upon making the required application for reemployment after his relief from training and service, be restored to such position "or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." U. S. C. A. Title 50, App. 308(a)(b)B.

The Act further provides in Section 308(c) of the same Title: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of [fol. 96] absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

The issue squarely presented to us is whether, in the circumstances of this case, the mandate of the statute that a veteran shall be restored to his former job *without loss of seniority* permits a labor-union collective bargaining agreement to whittle down his existing seniority at the time of his induction into the armed forces, in consequence of the further mandate of the statute that he shall not be *discharged without cause* within one year from the date of his reemployment.

Lawrence Whirls was employed by the Highland Body Manufacturing Company on February 8, 1935, and continued to be an employee of that corporation until he entered the military service of the United States on October 23, 1942. When he was inducted into the armed forces, Whirls was working under an employment contract by which seniority was to be determined from the last date of hiring and to be upon a departmental basis. The contract had been made with the company by the collective bargaining agent of all its employees.

Upon his honorable discharge from the armed forces of the United States, Whirls was reemployed by the Highland Company on May 3, 1943, in his former capacity in the Painting Department. The Highland Body Manufacturing Company was the wholly owned subsidiary of another corporation, The Trailmobile Company. Both corporations manufactured the same commodities in separate plants, in Cincinnati, Ohio, and had the same executive officers. The employees of Highland numbered approximately 100, while Trailmobile had 1000 employees. The commodity production of Highland totalled about $1,500,000; that of Trailmobile approximated $12,000,000.

After the reemployment of Whirls, a plan of liquidation of the Highland corporation was put into effect at the close of business on December 31, 1943. By that plan, Highland transferred and conveyed to The Trailmobile Company [1] [fol. 97] all its property and assets and its goodwill as a going concern; and Trailmobile assumed all the liabilities and obligations of Highland and undertook the performance of its outstanding contracts. Upon the effective date of the consolidation or merger, January 1, 1944, the employees of the Highland Body Manufacturing Company were transferred to the service and payroll of The Trailmobile Company.

Prior to the consolidation, the employees of both companies had been affiliated with the American Federation of Labor. As found by the district court, that organization ruled that all employees of both companies should, after the consolidation, rate seniority as of the date each had individually been employed by the respective companies. But, after the consolidation, the employees of The Trail-

[1] The actual conveyances were made to the Trailer Company of America, but in the pleadings and in the recorded procedure in the court below that company has been treated as if identical with The Trailmobile Company. We presume that the identity results from a charter amendment changing the corporate name; but this does not affirmatively appear in the record. However that may be, all parties to this controversy have presented the case and the district judge has ruled and written as if The Trailer Company of America and the appellant Trailmobile Company are identical; so, on this appeal, we have so considered them.

mobile Company selected the C. I. O. as its collective bargaining agent to negotiate an employment agreement with Trailmobile for all its employees. This collective bargaining agreement, negotiated by C. I. O. with The Trailmobile Company, was consummated and evidenced in writing sometime between the latter part of June and the middle of July, 1944.[2]

Admittedly, this labor contract fixed the seniority rights of the former employees of Highland as commenced on January 1, 1944, regardless of the actual date of employment of each individual. Thus, Whirl's seniority, dating from his original employment by Highland on February 8, 1935, was cut off and his seniority reduced to commence as of January 1, 1944. This vital reduction in his well advanced seniority status was made, notwithstanding lip service given fair treatment of the veteran in the following clause found in the C. I. O. bargaining agreement: "Employees entering a military, naval or other combat service, or conscripted by the United States in time of war will be considered on a leave of absence and will maintain and accumulate all seniority rights without interruption."

Represented by the United States Attorney, Whirl filed on September 18, 1945, in the United States District Court for the Southern District of Ohio a civil action against The Trailmobile Company. His complaint declared that, in violation of his lawful seniority status, he has been transferred from his position in the Painting Department, in which he had the highest seniority, to the Stock Depart- [fol. 98] ment of The Trailmobile Company where his pay is less; and that he has been deprived of his statutory rights to seniority as granted by Congress in the Selective Training and Service Act. Averring that he has been irreparably damaged and has no adequate remedy at law, he prayed a mandatory injunction directing his reinstatement by the defendant to his former position in its Painting

[2] The record does not disclose the exact date of this collective bargaining agreement, as only excerpts from the contract are included in the record and the date of the execution of the exhibit is not shown. The briefs and the pleadings are not consistent as to the dates, which, of course, causes confusion, but the confusion relates to immaterial matter.

Department and the restoration of his seniority to the date of his original employment, February 8, 1935.

After hearing the cause upon the oral stipulations of counsel and upon the exhibits introduced in evidence, the district court filed findings of fact and conclusions of law; and entered judgment that Whirls "is entitled to a restoration of his seniority status among the employees of The Trailmobile Company as such seniority status existed prior to his entry into the military service, and that, therefore, he is entitled to seniority as of date of hiring with The Highland Body Manufacturing Company, to wit: February 8, 1935." The Judgment entered directed that The Trailmobile Company reinstate the seniority of Whirls as of February 8, 1935, and cancel his present seniority status as of January 1, 1944. From this judgment appeals have been vigorously pressed by The Trailmobile Company, and the International Union, United Automobile, Aircraft, — Agricultural Implement Workers of America, U. A. W.-C. I. O., Local 390, which became a party defendant in the district court by filing an intervening petition and participating in the proceedings there.

The appellant company insists that the legislative history of the Selective Training and Service Act does not justify the conclusion that Congress intended "to upset the established labor relations on the production front by requiring that labor contracts be construed to include provisions for placing returned World War II veterans in a position at the head of the seniority list." The veteran Whirls is not asking to be placed in a position at the head of the seniority list. He is merely complaining that, in consequence of a collective bargaining agreement between his employer and a labor union which he has been forced to join in order to retain his job, he has been unjustly and unlawfully deprived of his seniority status as it existed *at the time he was inducted into the armed forces.*

It is a matter of common knowledge that there was much opposition to the original Selective Training and Service Act. Its existence was prolonged by Act of Congress by [fol. 99] the slim margin of one vote in the House of Representatives. Concurrently with its enactment and reenactment—and perhaps essentially so—there was held forth to the young men who were to be inducted into military service the strongest assurance that the *status quo* of their

employee relationships would be preserved as securely as was reasonably possible.

There can be no reasonable doubt that in the mind and heart of the Congress the provisions of Section 308(c) of the Act were designed and felt to be benevolent and avuncular to the young men compulsorily chosen for military training and service in time of national need. The Act expressly declared that it was imperative to increase and train the personnel of the armed forces of the United States; and that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selection.

The Act was passed by Congress and approved by the President with full knowledge of the existence of the National Labor Relations Act. That Act was not amended; but surely it should not be presumed that Congress, in failing to amend the Wagner Act, intended to permit the concerted action of a collective bargaining agency and an employer to destroy or whittle down the statutory right of the returning soldier, sailor, airman and marine to restoration to seniority security in his job granted by the Selective Training and Service Act.

The right to collective bargaining and all the privileges conferred by the Wagner Act upon noncombatant workers may be well preserved by just recognition in their collective bargaining agreements of the fair intendment of the Selective Training and Service Act that those who went to war must be protected in their then-existing seniority positions as long as the Act remains in effect. If this principle is accepted, there need be no industrial strife between those who worked and fought and those who worked but did not fight—which counsel for the Union and for the Company so gloomily predict. In our view, the language of the pertinent section of the Selective Training and Service Act, in its context, impels acceptance of this principle.

Reading together Section 308(b)B and Section 308(c), the mandate of the statute is plain that the veteran shall be restored by his private employer to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; and the person so restored to such position [fol. 180] shall be considered as having been on furlough or leave of absence during his period of military service

and shall be so restored *without loss of seniority*. As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces.

The right of the veteran to be restored to his former position without loss of seniority is an independent and additional right, not to be impaired by the other protective benefits accorded him by the statute. His right to participation in insurance or other benefits offered by the employer, pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time the veteran was ordered into military service, is *a separate and additional benefit*. Likewise, the last provision in paragraph (c), that the veteran "shall not be discharged from such position without cause within one year after such restoration," is a *separate, distinct and independent benefit* and should not be construed as limiting to one year the restoration of the veteran to his former position without loss of seniority. While he may not be discharged without cause within one year, if he is not so discharged he retains his seniority status as long as the Selective Training and Service Act in its present phraseology remains in effect. Collective bargaining agreements entered into pursuant to the terms of the Wagner Act must recognize the statutory right of the veteran to the seniority granted him by the selective service statute; and any such agreement which deprives him of that right is invalid to that extent.

In *Market Company* v. *Hoffman*, 101 U. S. 112, 115, the Supreme Court asserted that a court is not at liberty to construe any statute so as to deny effect to any part of its language; and that it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. See also *Ex Parte The Public National Bank of New York*, 278 U. S. 101, 104; *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

Nothing said in *Crooks* v. *Harrelson*, 282 U. S. 55, 59, 60, cited by appellants, gainsays the correctness of our construction of the statute in controversy. We are not

here rejecting, but are carrying into effect what we construe to be the literal meaning of the statute.

[fol. 101] To ignore the plainly expressed intention of the Congress that the veteran should be restored to his position without loss of seniority would be to adopt an unreasonable and unwarranted construction that the clause of the statute protecting the veteran against discharge without cause within one year after his return to his position nullifies the statutory guarantee of the preservation of his seniority status contained in a preceding clause.

This court very recently expressed the opinion that an employee's right to seniority employment status may stem from a statute. In *Elder* v. *New York Cent. R. R. Co.*, 152 F. (2d) 361, 364 (C. C. A 6), we said: "The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived The right, however, is not inherent. *It must stem either from a statute* or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. *In the absence of statute*, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. *In the instant case, the appellant rests upon no right created by statute*, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer." (Italics supplied.)

In the present controversy, Whirls holds a position diametrically opposite that of Elder. Whirls rests upon a right created by a Federal statute.

Appellants stress a recent district court opinion, *Olin Industries, Inc.* v. *Barnett* (S. D. Ill.; January 24, 1946), where Judge Briggle held that the employer need not advance the veteran beyond the seniority status which he would have attained had he not entered military service, but had remained on his job. The employee whom he would replace, if so advanced, had held a supervisory position over the veteran at the time he was inducted into service. The case is broadly distinguishable on its facts from the case at bar.

Since the argument and submission of this case, the Second Circuit Court of Appeals, in a two-to-one decision promulgated March 4, 1946, in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, —— F. (2d) —— (C. C. A. 2), held that a veteran who had been restored to his former position as required by the Selective Training and Service Act [fol. 102] was properly laid off by his employer during the first year following his restoration on occasions when there was insufficient work for all the employees and the employer preferred non-veterans who had higher shop seniority than the veteran in consequence of an agreement between the employer and a labor union. The decision in the *Fishgold* case relates to a veteran's rights under the selective service statute during the first year of his reemployment. In this respect, the case is dissimilar from that at bar. We are frank to state, with highest deference, that we are not in general accord with the views expressed by Judge Hand for the majority of his court. However, we are in hearty accord with his broad-minded admonition: "The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible."

Cognizance should be taken of the appropriately liberal interpretation of the returning veteran's rights to reemployment, assured by the Selective Training and Service Act, as evidenced by the opinion of Judge McLaughlin announced February 26, 1946, in *Grasso* v. *Crowhurst*, —— F. (2d) —— (C. C. A. 3). See also *Kay* v. *General Cable Corporation*, 144 F. (2d) 653 (C. C. A. 3).

We find no merit in the argument of appellants that the rights of the appellee Whirls to his seniority status are not protected by the Selective Training and Service Act, for the reason that the Highland Body Manufacturing Company, after conveying its property and assets to the appellant Trailmobile Company, surrendered its corporate existence. The contention is that Whirls became a new employee of the appellant Trailmobile Company. As found by the district court, the appellant company, as it now exists after the complete absorption of its former subsidiary corporation, is, under the plan of consolidation, obliged to carry out and fulfill all the contracts and obligations of its subsidiary. The seniority status of Whirls guaranteed by the statute was equally binding upon the

Trailmobile Company as upon the Highland Company. The two companies must be treated as identical, insofar as the statutory rights of the veteran are concerned.

For analogous cases of corporate identity, as declared and dealt with under the Fair Labor Standards Act, see *National Labor Relations Board* v. *Federal Engineering Company, et al.*, —— F. (2d) —— (C. C. A. 6), decided February 6, 1946; *National Labor Relations Board* v. *Swift* [fol. 103] *& Co.*, 127 F. (2d) 30, 32 (C. C. A. 6); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 71, 72 (C. C. A. 3); *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567, 569 (C. C. A. 7); *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342, 346 (C. C. A. 8).

Schenley Distillers Corporation v. *United States, et al.*, —— U. S. ——, decided January 2, 1946, does not support the position of appellants. In its opinion in that case the Supreme Court stated: "The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them."

Appellants contend that the rights which appellee seeks to have determined in this civil action in the federal court have been finally adjudicated against him by the Ohio state courts in *Hess* v. *Trailer Company of America*, 31 O. L. R. 51 (Oct. 15, 1945); 31 O. L. R. 566 (Dec. 10, 1945). It is insisted that the adjudication in the Hess case is binding upon this court under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. The argument is fallacious. Decision in the instant controversy is governed by an Act of Congress. The subject matter before us does not pertain to general common law. The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts.

There is another ground for rejecting appellants' argument. Identity or community of interest of the parties in whose behalf a class action is brought is essential to its maintenance. In *Hansberry* v. *Lee*, 311 U. S. 32, 45, the Chief Justice sketches the evolution of the class suit as an invention of equity; states the supporting reasons for its recognition; and points out that the selection of representatives for purposes of litigation "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford

that protection to absent parties which due process requires." An interesting and instructive annotation to the opinion of the Chief Justice appears in 132 American Law Reports, Annotated, 749, et seq.

A most scholarly and elucidating opinion upon class actions will be found in *Weeks* v. *Bareco Oil Co.*, 125 F. (2d) 84, 92. Judge Evans reviews and discusses the authorities. He quotes with approval the following statement in *Waybright* v. *Columbian Mutual Life Ins. Co.*, 30 F. Supp. 885, 888 (W. D. Tenn.), in which the pertinent [fol. 104] authorities pertaining to class suits had also been reviewed: "So, it seems settled law that a small minority of numerous interested parties may maintain a class suit in behalf of themselves and others, *similarly situated for an object common to them all.*" (Italics supplied.) The decree in the *Waybright* case was affirmed on appeal to this court: 122 F. (2d) 245 (C. C. A. 6).

For other illustrative authorities asserting the necessity for identity of interest in class actions, see *Redmond* v. *Commerce Trust Co.*, 144 F. (2d) 140, 151 (C. C. A. 8); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F. (2d) 261, 264 (C. C. A. 8); *Atwood* v. *National Bank of Lima*, 115 F. (2d) 861, 863 (C. C. A. 6).

The *Hess* case was not an appropriate class action in which the judgment entered could be binding upon Whirls, inasmuch as he was not similarly situated with all the parties in whose behalf the class action was instituted in the state court by Hess against the Trailer Company of America. The rights of the members of the class in whose behalf Hess brought the suit were not identical. Some were men who had been inducted into the armed forces under the Selective Training and Service Act; the majority were not. Hess brought the suit against the corporate employer on his own behalf and on behalf of 178 other employees, nominally including the appellee Whirls. He averred in his petition that the employees were "similarly situated"; but asserted that 104 of them were "actually working" for the defendant company and that 74 of the total number were employees of the defendant company who, at the time of the filing of the suit, were "in the armed forces and services of this Country."

The judgment entered in the Court of Common Pleas of Ohio, affirmed by the Court of Appeals for Hamilton County, Ohio, declared, *inter alia*, that "the defendant

Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944, acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought."

This declaratory judgment of the state court is not binding upon this court. If recognized here, the judgment of the Ohio courts would nullify the right of the appellee Whirls to his seniority status as an employee of the appellant company as of February 8, 1935. His seniority status as of that date is, as we have shown, guaranteed by the [fol. 105] Selective Training and Service Act as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company.

The judgment of the district court is affirmed.

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

date of hiring and to be upon a departmental basis. Whirls's seniority dated from February 8, 1935, when he was employed.

Upon his honorable discharge from the armed forces, Whirls was reemployed on May 3, 1943, and was "restored" to his former position, with the identical seniority rights dating from February 8, 1935, which seniority rights he held for a period of more than one year from his reemployment. It is admitted that he was "so restored without loss of seniority."

Whirls continued in this position with the Company, without any change in his seniority status until the summer of 1944, a period longer than "one year after such restoration." At that time, under a new labor union collective bargaining agreement, Whirls's seniority, dating from his original employment on February 8, 1935, was changed and his seniority reduced to commence as of January 1, 1944. Thus more than a year after he had been "so restored without loss of seniority," Whirls's seniority status was reduced below the seniority status which existed at the time of his induction into the armed forces. It is immaterial, we submit, to the legal question involved, as to the reasons for this reduction in his seniority status in the process of collective bargaining, but briefly it resulted from a transfer of the affiliation of the employees from an AFL union to a CIO union, following the Trailmobile Company's (parent corporation's) purchase of the assets of its subsidiary corporation and the merging of the operations of the two separate plants. Whirls had been an employee of the subsidiary. On January 1, 1944, he became an employee of the parent corporation, and has remained in its employment.

The issue presented is whether the Selective Training and Service Act prohibits such "loss of Seniority" after

the expiration of "one year after such restoration" to his former position.

It is stipulated that Whirls was "so restored without loss of seniority" on May 3, 1943, and that there was no reduction of the status quo of his seniority status (as it existed at the time he was inducted into the armed forces) until more than "one year after such restoration."

We submit that the Circuit Court of Appeals erred in construing the words of the Act "without loss of seniority" to guarantee the seniority status of Whirls as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company."

Section 308(b) (B) of the Act provides that the employer "shall restore such person (veteran) to such position or to a position of like seniority," and Section 308(c) provides that "Any person who is restored to a position shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority," etc.

The words "without loss of seniority" are preceded by the words "so restored," and qualify and limit the application of the words "without loss of seniority" to the time implied in the words "so restored." There is no express provision in the Act fixing any seniority rights of the returning veteran, after such restoration, as of any later definite or determinable date, or so long as the Act remains in effect, or so long as the returning veteran remains in the service of his employer. There is nothing in the Act which necessarily or reasonably intends or implies such broad, indefinite and comprehensive periods of time, after the restoration to his position.

Without the Act an employee leaving the employment of the employer for any reason, including joining the armed

forces of the United States, would have lost his job and his seniority status. Upon discharge from the armed forces, he would have been a new employee of the Company with seniority as of that date of hiring. The Act, we submit, was passed to prevent such a result. The Act does not in words nor by implication guarantee seniority for any period of time, but provides that the employee shal be restored by the employer without loss of seniority and "shall not be discharged from such position without cause within one year after such restoration." There being no guarantee of employment longer than one year, there could not therefore be a continuing guarantee of seniority for a period longer than that one year. Thereafter, such employee's rights of employment are protected by the National Labor Relations Act and collective bargaining rights thereunder.

Respondent prayed for a mandatory injunction directing the petitioner, The Trailmobile Company, to restore his seniority to the date of his original employment with the subsidiary, to-wit: February 8, 1935.

The issues were tried before Judge John H. Druffel in December 1945. He rendered a Findings of Fact and Conclusions of Law on December 18, 1945, and Judgment Entry was entered thereon December 20, 1945, finding the issues in favor of respondent and ordering respondent restored to his seniority status as it existed prior to his entry into the military service.

The judgment was appealed to the United States Circuit Court of Appeals for the Sixth Circuit where it was argued on February 12, 1946, and a decision was rendered April 5, 1946, affirming the judgment.

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that § 8 (b) and (c) of the Selective Training and Service Act of 1940 entitled respondent to seniority

as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Waris remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all others similarly situated) seniority status.

Reasons for Granting the Writ

No other appellate court has decided the question at issue in this case. The issues herein do not directly raise the super-seniority question presented in *Fishgold* v. *Sullivan Drydock*, No. 970 on the docket of this court. The question raised here is more far-reaching than the super-seniority question raised in the *Fishgold* case, because it determines that a veteran's seniority is fixed as of date of entry into the service and cannot thereafter be changed through collective bargaining *as long as the Act remains in effect and the employee continues in employment with the employer.*

Judge Martin in writing the opinion below, had this to say:

> "The decision in the Fishgold case relates to a veteran's rights under the Selective Service Act during the first year of his reemployment. In this respect, the case is dissimilar to that at bar. We are frank to state, with highest deference, that we are not in general accord with the views expressed by Judge Hand for the majority of his court. *However, we are in hearty accord* with his broad-minded admonition: 'The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.'" (Italics supplied.)

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APR 13 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1099

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICAN, U. A. W. C. I. O. LOCAL No. 392,

Petitioners,

vs.

LAWRENCE WHIPPS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1099

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.-C. I. O., LOCAL No. 392,

Petitioners,

vs.

LAWRENCE WHIRLS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitionesr herein pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered April 5, 1946, affirming a judgment in favor of the Respondent against The Trailmobile Company and the International Union, United Automobile, Aircraft and Agricultural Workers of America, UAW-CIO., Local 392, and granting a mandatory injunction in favor of Respondent.

Opinion Below

The Opinion in the United States Circuit Court of Appeals for the Sixth Circuit (R. 70), is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered April 5, 1946 (R. 70). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

The jurisdiction of the United States District Court which rendered the judgment from which the appeal was taken was conferred by the Selective Training and Service Act of 1940, as amended (U. S. C. A. Title 50, App. §308, c. 720, §8, 54 Stat. 890, as amended July 28, 1942, c. 529, §2, 56 Stat. 724, as amended Dec. 8, 1944, c. 548, §1, 58 Stat. 798). The pertinent sections are printed as Appendix A.

Question Presented

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, gives to a War Veteran who was restored to the position of employment occupied by him prior to his military service, and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service after that one year reemployment period and "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company" notwithstanding the fact that his union, through collective bargaining, had changed the seniority provisions of the employment contract.[1]

[1] The changed seniority provision, made after the employee was reemployed for a full year, was due to the fact that the parent corporation purchased the assets of its subsidiary corporation; the employees changed union affiliation, and the employees of the subsidiary were held to be new employees by the newly certified union, which the Ohio courts held they had a right to do.

Statute Involved

The pertinent provisions are set forth in Appendix A.

Statement of Case

Respondent, Whirls, was employed by The Highland Body Manufacturing Company, a wholly-owned subsidiary of The Trailmobile Company, on February 8, 1935, and worked for that company continuously until he entered the Armed Forces of the United States on October 23, 1942. Thereafter he was honorably discharged and returned to his employment with The Highland Company on May 3, 1943. His seniority status and pay were not reduced or changed while he continued to work for that company. On December 31, 1943, that company was dissolved, all of its assets were sold to The Trailmobile Company, and on January 1, 1944, he was transferred to the payroll of The Trailmobile Company. His Seniority status continued as it was with The Highland Company and was not altered until July 7, 1944, when, by collective bargaining, the certified union changed his and all other Highland employees' seniority to January 1, 1944. His status and pay are not in question in this case. His claim to seniority is the question involved here. The facts were stipulated and appear at page 1.

The Circuit Court of Appeals held that the Selective Training and Service Act guaranteed the preservation of the status quo of the seniority status of Whirls (as it existed as the time he was inducted into the armed forces) "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company."

When he was inducted into the armed forces, Whirls was working under a labor union collective bargaining agreement by which seniority was to be determined from the last

The question here presented is one of great public interest and affects the rights of hundreds of thousands of veterans and the rights of hundreds of thousands of nonveteran employees. Collective bargaining agreements are being constantly made and remade each year affecting the seniority status of innumerable employees whether veteran or nonveteran and the chaotic labor conditions at this plant are representative of the chaotic conditions which would prevail in other plants unless this Court finally determines the issues herein.

In this case in the District Court the union intervened as a party defendant, in the Sixth Circuit Court it filed its briefs, and argued the case, but the International Officers of the Union, by leave, filed an additional brief strongly urging the national import of a decision such as now rendered by the Sixth Circuit Court of Appeals.

The broad scope of the decision granting permanent seniority to veterans is one of vast and far-reaching importance to employers and employees both veteran and nonveteran. Certiorari having been granted in the *Fishgold* case, and that case having been set for argument before this court, it is submitted that this court should consider this case as promptly as it is giving consideration to the *Fishgold* case.

Pursuant to Section 8(c) of the Selective Training and Service Act the trial court advanced this case on the docket for "speedy hearing" and rendered a prompt decision. Likewise the Circuit Court of Appeals advanced this case on the docket for argument and rendered its decision promptly.

It is respectfully urged that this court likewise should advance the case to the earliest date available.

An additional reason for such request, we urge, is that if the decision of the Circuit Court of Appeals is sustained,

it will place in jeopardy the positions of returning veterans after the expiration of one year from their reemployment and will defeat the very purpose of the statute enacted for the benefit of returning veterans, as, in order to get rid of such status quo seniority, which continues so long as the veteran is employed, the majority union members may compel the employer to discharge such returning veteran after the expiration of said one-year period. As in this case, the union might expel the veteran from the union, and thereby compel this employer to discharge such veteran under its closed shop contract with the union.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

U. S. C. A. TITLE 50, APP. § 308. As amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

U. S. C. A. TITLE 50, § 308. As amended July 28, 1942, c. 529, § 2, 56 Stat. 724.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military

service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

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No. 85 — October Term, 1946

Supreme Court of the United States

THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL WORKERS OF AMERICA, U. A. W. — C. I. O., Petitioners,

vs.

LAWRENCE WHIRLS, Respondent.

BRIEF OF THE U. A. W.—C. I. O., LOCAL NO. 392, ONE OF THE PETITIONERS HEREIN.

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Supreme Court of the United States

No. 85

October Term, 1946.

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, *U. A. W.—C. I. O.* Local No. 392,

Petitioners,

vs.

LAWRENCE WHIRLS,

Respondent.

BRIEF OF THE U. A. W.—C. I. O., LOCAL NO. 392, ONE OF THE PETITIONERS HEREIN

I. OPINION OF THE COURT BELOW

The Opinion in the United States Circuit Court of Appeals for the Sixth Circuit (R. 70) is reported in 154 Fed. 2 866.

II. JURISDICTION

The Court granted the petition for certiorari on June 10, 1946, reported in 90 Sup. Ct. Law. Ed. 1260.

III. STATEMENT OF THE CASE

Lawrence Whirls was employed by the Highland Body Manufacturing Company on the 8th day of February, 1935 and worked for them until he entered the armed forces of the United States on October 23rd, 1942; he received an honorable discharge from the military service and was restored by his employer to his former position and seniority rights on May 3rd, 1943.

On December 31st, 1943, the Highland Body Manufacturing Company sold all of its property and assets to the Trailmobile Company which assumed its obligations, its entire operation was transferred to Trailmobile and it took over all of the former Highland Body Manufacturing Company employees as its own employees on January 1st, 1944.

The Union, UAW-CIO, after an election was certified by the National Labor Relations Board as the exclusive bargaining agent for all employees of the Trailmobile Company in December 1943; and as such Bargaining Agent entered into a contract dated July 15th, 1944 giving seniority to the employees of the Trailmobile Company from their date of hiring; and to all former Highland Body Manufacturing Company employees from the day when they became employees of the Trailmobile Company.

Plaintiff has had employment with the Highland Body Manufacturing Company and the Trailmobile Company for some three (3) years since his discharge from the armed forces.

The present suit was instituted by the United States District Attorney on behalf of the plaintiff claiming that plaintiff's statutory rights to seniority as granted by Section 308, Title 50 of the United States Laws are being taken away from him.

The Trailmobile Company now has some 400 returned veterans in its employ and some 40 former Highland Body Manufacturing Company employees, who are returned veterans, in its employ. Any seniority awarded to Highland veterans means that Trailmobile veterans lose their seniority, as it existed when they entered military service.

There was also presented in evidence an agreement between the Highland Body Manufacturing Company and the Trailmobile Company of America, with the United Automobile Workers of America, Local 131, A. F. of L. which was in existence at the time plaintiff entered the armed forces and expired by time limitation before his return. This exhibit (Exhibit C) provides: (R-22)

> Section 6. "Any employee may transfer permanently to another Department but will become the junior to all employees on the seniority list in the Department to which his transfer is made."

The evidence also contains the pleadings, extract of evidence, judgment entry and decree of affirmance, in the case of HESS v. TRAILMOBILE COMPANY OF AMERICA, ET AL. In the decree and entry of affirmance entered by the Court of Appeals, Hamilton County, Ohio, Case No. 6503, paragraphs 1, 2 and 4 read as follows: (R-52, 53)

> "The defendant Union and the defendant company had a legal right to enter into a contract fixing the seniority dates and rights of plaintiff employees as of January 1st, 1944.
>
> Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights cannot arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

"The Court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944, acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought."

Motion to Certify was overruled by the Ohio Supreme Court on October 15, 1945, Sec. 31 O. L. R. 51. (R-55)

The facts then present the following three points:

1) Two corporations having interlocking Board of Directors operated plants in different cities under a collective bargaining contract giving the employees of either plant the privilege of working in departments of other plant by waiving all seniority acquired in the first plant and gaining seniority from the date of hiring in the second plant. One of said corporations purchased all of the assets and assumed the obligations of the other corporation and agreed to employ its employees. The purchasing corporation entered into a collective bargaining agreement with a union certified by the National Labor Relations Board, fixing the seniority of all employees as of the date of hiring, and thus establishing the seniority of the employees of the dissolved corporation as of the date of their hiring by the purchasing corporation.

2) An employee of the dissolved corporation instituted an action in a state court on his own behalf and on behalf of all other employees, and the state court rendered a decision sustaining the collective bargaining agreement, the decision was affirmed by the Appellate and Supreme Court of the State.

3. An employee of the dissolved corporation, who was an honorably discharged veteran, brought action against the purchasing corporation claiming that the collective bargaining agreement was not binding upon him and that the purchasing corporation should award him seniority from the date of his hiring by the dissolved corporation rather than the date of his hiring by the purchasing corporation.

IV. SPECIFICATION OF ERRORS

In the petition for writ of certiorari, the questions presented and the specification of errors are set forth, as follows:

QUESTIONS PRESENTED

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, gives to a War Veteran who was restored to the position of employment occupied by him prior to his military service, and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service after that one year reemployment period and "as long as the Act remains in effect, and as long as Whirls remains in the service of the appellant company" notwithstanding the fact that his union, through collective bargaining, had changed the seniority provisions of the employment contract.[1]

---

(1) The changed seniority provision, made after the employee was reemployed for a full year was due to the fact that the parent corporation purchased the assets of its subsidiary corporation; the employees changed union affiliation, and the employees of the subsidiary were held to be new employees by the newly certified union, which the Ohio courts held they had a right to do.)

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 8 (b) and (c) of the selective Training and Service Act of 1940 entitled respondent to seniority as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act and thereby change his (and all other similarly situated) seniority status.

V. ARGUMENT

The statement of the case gives a summary of the evidence and the points of fact and law are set forth. In presenting the authorities in support of the contentions of petitioner, we direct the Court's attention to the following:

A. WHAT IS THE LAW OF OHIO?

Under the laws of our State, as set forth by the Supreme Court of Ohio, an employer may hire or fire employees at any time. See NEW YORK, CHICAGO and ST. LOUIS RAILROAD COMPANY v. SCHAFFER, 65 OHIO STATE, 414:

> "It is the right of every person, natural or artificial, to employ or refuse to employ in his business whomsoever he may wish, and he cannot be called upon to answer for his judgment in that regard by the public or individual, nor the motives which prompt his action be considered. A rail

> road company may lawfully refuse to continue in its employ a person who has engaged in a strike affecting its interests, or who has shown himself to be negligent, incompetent, inefficient or dishonest."

The above decision clearly illustrates that so far as the law of Ohio is concerned an employee has no basis for complaint and that any right given to an employee as to seniority is based entirely on the terms of the contract. In this case the evidence shows that the contract that existed prior to June, 1944 expired by its time limitation and had been abrogated by the National Labor Relations Board when it ordered a new election and certified the UAW-CIO as the new bargaining agent. Any rights that plaintiff has or claims to have must be under the agreement made by the UAW-CIO. He cannot claim rights that the UAW—CIO might have created for plaintiff but is confined only to such as are actually created. These rights consist of seniority as of January 1st, 1944.

The State Court determined from the evidence that the two corporations were to be considered as separate and distinct corporate entities. (R-55). Its decision is in line with the holding by this Court in the case of SCHENLEY DISTILLERS CORP. v. U. S. et al, 90 Sup. Court Law Ed. 217, decided January 2, 1946 wherein the court, at page 219, stated:

> "While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has

created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them. 'If the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act.' *"Edwards* v. *Chile Copper Co.* 270 U. S. 452, 456, 70 L. ed 678, 682, 46 S. Ct. 345. Cf. *Gray* v. *Powell,* 314 U. S. 402, 414, 86 L. ed. 301, 311, 62 S. ct. 326; *Moline Properties* v. *Commissioner of Internal Revenue,* 319 U. S. 436, 87 L. ed. 1499, 63 S. Ct. 1132."

The evidence disclosed that the class suit which had been instituted in the State Court was brought at a time after Plaintiff-appellee had returned from the military service, *while he was working at the plant and was named as one of the parties in the class suit.* The main issues decided in the State Court were fully determinative of the contentions being made in this case and certainly were issues that could have been fully determined in the State Court and would be just as binding as an adjudication.

"A prior judgment is a finality as to the claim or demand in a controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." FISHGOLD v. SULLIVAN D. & R. CORP., SUP. CT. L. ED. 90, PAGE 962

B. WHAT RIGHTS DOES PLAINTIFF HAVE UNDER THE SELECTIVE SERVICE ACT?

In the first place it should be kept clearly in mind that this case does not involve the failure of the employer defendant to restore the plaintiff to his former position and employment. Under the contract that existed when he entered the armed services, if he elected to be transferred from the Highland Body Manufacturing Company to the Trailmobile Plant his "seniority" would start from the date of employment at the Trailmobile Plant.

In any event, it is clear from the record that plaintiff was restored to his former position and for 35 months after such restoration was not denied work on a single day . . . in fact, plaintiff's counsel stipulated that the employer defendant had restored the plaintiff to his former position on February 8th, 1943. Accordingly, there is not involved in this case any question of whether an employer may refuse to restore a veteran to his old position on the ground that the amount of work available in the employer's plant is sufficient only to afford employment for employees of greater seniority than possessed by the veteran. The sole issue here involved is whether an employer, after having restored a veteran to his former position, contravenes Section 8 (c) of the Act, if after the veteran has had 35 months employment, by reason of a bargaining contract his seniority date is fixed as of January 1, 1944.

> "(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the em-

> ployer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Section 8 (c) provides that the veteran restored to his former position "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces". In the same sentence of Section 8 (a) is contained the further provision that the veteran shall be restored to his position "without loss of seniority". In other words, Congress directed that as to insurance and other benefits the restored veteran's rights should be governed by the employer's "established rules and practices" as to such other benefits, and at the same time provided that the veteran should be restored to his position "without loss of seniority". It is thus obvious that Congress used the word "seniority" in a meaning different from that in which it used the phrase "established rules and practices"; it is equally obvious that Congress must have meant that benefits governed by seniority were different from the "other benefits" governed by other "rules and practices". What phase of the employment relation did Congress deem to be governed by "seniority"? Why did it provide against the restored veteran's loss of "seniority"? Congress could not have intended that "seniority" govern the order of "discharge" since as to "discharge" Congress itself provided a governing rule in Section 8 (c) — that a "discharge" could not be made except for cause. Equally Congress could not have intended that "Seniority" govern insurance and similar benefits since

it provided that such benefits be governed by "established rules and practices". The remainder of the area of employer-employee relationship to which the word "seniority" as used by Congress can apply, is therefore the restricted area of transfer, promotion and lay-off.

Thus, from the language of Section 8 (c) of the Act it must be clear that by the word "seniority" Congress was referring to the position which the veteran occupied before entering the military service. At the time of the plaintiff's induction into the armed forces he had no seniority standing whatsoever on the list of the Trailmobile Company. The "seniority" that is given to him can certainly be no greater than "employment" which he received. If after one year the plaintiff may be "discharged from such position without cause" then how can it be contended that his "seniority" standing cannot be affected? Certainly, the whole (employment) is greater than any of its parts (seniority).

This Court, in the Fishgold case, *supra*, syllabus 11, decided as follows:

> "The "position" in his former employment to which, under the provisions of the Selective Training and Service Act of 1940, a discharged veteran is to be restored, is the "position" which he left, plus accumulated seniority."

At page 967, the Court said:

> "We can find no support for petitioner's position in the provision of Section 8 (b), which restores him to his former position or to a "position of like seniority". Nor can we find it in Section 8 (c) which directs that he "shall be so restored without loss of seniority". As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his ab-

sence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. *But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.* We agree with the Circuit Court of Appeals that by these provisions Congress made the retoration as nearly a complete substitute for the original job as was possible. No step up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

At page 969, the Court said:

"Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. *What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.*"

The Circuit Court of Appeals felt that it was not bound by the issue of fact which had been fully determined by state court wherein it held that the two corporations were separate corporate entities. The decision was based on the undisputed facts and a similar holding was required not only because of such prior adjudication but also on the facts in this case. In this, we think the Court erred.

In its opinion, the Circuit Court was of the belief that the Congressional Act here involved *created seniority systems in plants,* whether or not seniority systems theretofore existed (R. 77). Such construction is diametrically opposed to the provisions of the Act and the decision of this Court, in the Fishgold case. The respondent, in this case entered military service, leaving a position with the Highland Body Manufacturing Company in its paint-shop, having a seniority status on its payroll beginning in February, 1935. He had seniority of superior rights under the contract then existing in the Highland Body paint shop over all other employees who had been hired subsequent to that date. *He had no seniority rights in the paint shop of the Trailmobile Company.* Employees of the paint shop of the Trailmobile Company who had been hired subsequent to 1935, when they entered military service, had a right upon return to their jobs to be placed at the same point where they had left off, with only those ahead of them who had been hired by the Trailmobile Company prior to their date of hiring. *The decision of the lower Court, in this case, places the respondent in the Trailmobile Company paint shop ahead of Trailmobile veterans and, in effect, deprives the latter veterans of their seniority rights.*

The effect of the lower Court's decision is to place the Union in a position where it must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supercede them on the seniority list, or, (b) in fairness to the Trailmobile veterans, negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment. By this strained construction placed on the Act of Congress, the Courts are turning a veteran's benefit into an absolute detriment.

From what has been said above, it must be evident that:

1. The question involved in this case as to the propriety of fixing seniority of former Highland Body Manufacturing Company employees as of January 1st, 1944 has been considered and adjudicated by the State Courts.

2. There is nothing in the Selective Service Act which sets up a system of seniority unless seniority exists in the plant by reason of a bargaining contract or a private contract between the employer and employee.

3. The Selective Service Act cannot be stretched to give the Federal Court jurisdiction beyond the utmost relief it granted to returning veterans of "re-employment for one year".

4. The Selective Service Act cannot be extended to provide for discrimination between veterans, by giving the 40 returning veterans of the former Highland Plant superior rights over the 400 returning veterans of the Trailmobile Company Plant.

5. The Selective Service Act does not restrict a Union, as Bargaining Agent certified by the N.L.R.B., from entering into a contract with the employer, which provides for seniority status for employees, even though as an incident thereof, but without discrimination or fraud, it may affect the seniority status of veterans.

RELIEF

We respectfully submit that plaintiff was not entitled to the relief prayed for and that this Court should reverse the judgment of the lower court and order the dismissal of the Complaint.

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No. 85

October Term, 1946

IN THE

Supreme Court of the United States

THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO,

Petitioners,

v.

LAWRENCE WHIRLS,

Respondent.

BRIEF ON THE MERITS ON BEHALF OF THE TRAILMOBILE COMPANY, PETITIONER

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BRIEF ON THE MERITS ON BEHALF OF THE TRAILMOBILE COMPANY, PETITIONER

I. OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of Ohio is not reported. The Court's findings of fact appear at R. 63, the Court's conclusions of law at R. 65 (64 Fed. Supp. 713), and the Judgment Entry at R. 67 (R. refers to pages of printed record herein).

The Opinion of the United States Circuit Court of Appeals, Sixth Circuit, is reported in 154 Fed. (2d) 866, and R. 70.

II. JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 5, 1946 (R. 70). The petition for a writ of certiorari was filed on April 11, 1946, and granted on June 10, 1946, 66 Sup. Ct. Rep. 1364; 90 Sup. Ct. L. Ed. 1260. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The jurisdiction of the United States District Court which rendered the judgment from which the Appeal was taken was conferred by Section 8(e) of the Selective Training and Service Act of 1940, as amended. (USCA, Title 50, App. § 308; c. 720, § 8, 54 Stat. 890, as amended July 28, 1942, c. 529, § 2, 56 Stat. 724, as amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798).

III. QUESTION PRESENTED

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, give to a War Veteran who was restored to the position of employment occupied by him prior to his military service without loss of seniority, and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service after that one year reemployment period and "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company" notwithstanding the fact that his union after one year of reemployment, through collective bargaining, made a new labor contract which changed the seniority provisions of the employment contract.[1]

[1] The changed seniority provision, made after the employee was reemployed for a full year, was due to the fact that the parent corporation purchased the assets of its subsidiary corporation; the employees changed union affiliation; and the employees of the subsidiary were held to be new employees of the parent by the newly certified union, which the Ohio courts held they had a right to do (R. 52, 55).

IV. STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set out in the Appendix, pp. 22 and 23.

V. STATEMENT OF CASE

The facts were stipulated to the Trial Court (R. 1-55).

Respondent, Lawrence Whirls, on February 8, 1935, was employed as a painter in the Paint Department by The Highland Body Manufacturing Company (hereinafter called Highland), a wholly owned subsidiary of The Trailmobile Company (hereinafter called Trailmobile). He worked continuously for Highland until he entered the Armed Forces of the United States, on October 23, 942. Thereafter he was honorably discharged, and upon application made was reemployed as a painter by Highland on May 3, 1943. Upon reemployment he was placed on Highland's seniority list as of date of hiring, February 8, 1935. His status and pay were not reduced while he continued to work for that company. On December 31, 1943, Highland was dissolved. All of its assets were sold to Trailmobile, which assumed all of the obligations of Highland, and on January 1, 1944, together with all other Highland employees, Whirls was placed on the payroll of Trailmobile. Although he had never been on the payroll of Trailmobile before, he was placed on the seniority list as of date of hiring with Highland, to-wit, February 8, 1935 pursuant to a previous ruling of the AFL union at a time when it represented the employees of both companies. He was employed in the Paint Department of Trailmobile, so that his status was unchanged. His pay was the same or greater than it had been with Highland. More than 14 months after his reemployment as above stated, to wit, on July 15, 1944, Trailmobile, his new employer, as a result of collective bar-

gaining with the newly N. L. R. B.-certified CIO Union, entered into a contract whereby his seniority was changed from February 8, 1935, to January 1, 1944. This change in seniority was likewise applicable to all other former Highland employees who were entered on the Trailmobile payroll on January 1, 1944.[2]

His status and pay are concededly not issues in this case. His claim to seniority is the issue involved here.

When Whirls was inducted into the Armed Forces he was working under a labor union agreement (Exhibit "C," R. 21), by which seniority was to be determined from the last date of hiring with Highland. His seniority was on a departmental basis and the contract provided that upon a permanent transfer, the transferred employee became junior to all the other employees in the new department. Previous to December 31, 1943, and pursuant to the then contract, employees who voluntarily transferred from Highland to Trailmobile were placed at the bottom of the Trailmobile seniority list in the department to which transferred.

Contracts were entered into bi-annually or annually between the employees' union and the company. Prior to 1943 the employees were represented by the AFL union, but during 1943, after a National Labor Relations Board

[2] Because of the seniority provision of the 1944 contract, one Louis J. Hess filed a representative suit in the Common Pleas Court of Hamilton County, Ohio, to determine the right of the company and the union to fix seniority for all Highland employees as of January 1, 1944. The suit was on behalf of Hess and all other former Highland employees, *naming Whirls as a then employee*, and one on whose behalf the suit was filed. The Courts of Ohio finally determined that the Company and the Union acted within their lawful rights by treating the former Highland employees as new employees of Trailmobile as of January 1, 1944 (R. 52, 53). Whirls had been reemployed following his service with the Armed Forces more than a year when this case was filed and thereafter decided. Herein Petitioner is named The Trailmobile Company, which name was changed in 1944 from The Trailer Company of America (R. 72, note) and R. 61). The opinion of the Common Pleas court is reported in 31 O. O. 566; Court of Appeals' affirmance and findings, R. 54; Motion to certify record to Ohio Supreme Court overruled, 31 O. Law Rep. 54; October 15, 1945, issue, also October 15, 1945, Vol. 18, issue of "Ohio Bar Association Reports," at page 314. Neither O. Law Rep. nor Ohio Bar Association Reports are published in bound editions, and the ruling appears only in the foregoing publications.

election, representation was changed by the vote of the employees from the AFL to the CIO. The CIO was the certified bargaining agent when the contract of June 21, 1944 (R. 41), and the contract of 1945 (Ex. "D," R. 23),[3] were consummated. Under the terms of the 1944 contract, Whirls did not have to become a member of the CIO union, but under the terms of the 1945 contract with the CIO, Whirls, and all other former Highland employees, had to become members of the CIO union under the closed shop provision of that contract, and he was a member of that union at the time this suit was filed below.

Respondent, Whirls, filed suit through the United States District Attorney in the United States District Court, Southern District of Ohio, and based upon the foregoing facts, the Trial Court found the issues in favor of respondent and ordered respondent restored to his seniority as it existed at the time he entered the military service (R. 63, 67).

The judgment was appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which court, inter alia, found (R. 70) that respondent's seniority was fixed as of the date he entered the military service and "as long as the Act remains in force and as long as Whirls remains in the service of the appellant company" (R. 81) and affirmed the District Court.

VI. SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that § 8 (b) and (c) of the Selective Training and Service Act of 1940 entitled respondent to seniority

[3] These contracts, that of 1944 (R. 43) Section 4, Factor A, and that of 1945 (Exhibit "D," R. 23) Article VIII, Section 1, provide that seniority "shall date from employee's length of service with this company." The 1944 contract was executed July 15, 1944, as of June 21, 1944 (R. 49, Paragraph 5), which paragraph shows that pursuant to CIO demand and through collective bargaining, Highland employees were placed on seniority list as of January 1, 1944, the date of their hiring with Trailmobile.

as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all others similarly situated) seniority status.

VII. SUMMARY OF ARGUMENT

A. The pertinent provisions of Section 8 of the Act do not grant seniority other or different than the seniority which the veteran would have had if he had not gone into the military service. The Act provides that the veteran shall be restored to a position of like seniority, that he shall be restored without a loss of seniority, and that during the veteran's period of military service he shall be considered by the employer as on furlough or leave of absence. The Act further provides that the veteran shall not be discharged without cause for the period of one year from reemployment.

Respondent, Whirls, was reemployed following honorable discharge, by Highland, his original employer, and a wholly owned subsidiary of Trailmobile, on May 3, 1943. He was then given the same job he had when he left for the service and was then given seniority as of February 8, 1935, his original date of employment. That employer was dissolved on December 31, 1943. On January 1, 1944, he was employed by Trailmobile, the purchaser of all of the assets of Highland, which purchaser likewise assumed all of the obligations of the dissolved corporation. In his new position he was continued with a seniority rating as of February 8, 1935, the date of hiring with the dissolved corporation, until July 15, 1944. During this period of over fourteen

months, his seniority, status, and pay remained unchanged. On July 15, 1944, the new employer as a result of collective bargaining with the duly certified collective bargaining agent for its employees, including respondent, changed his seniority to January 1, 1944, the date he was entered on the payroll of the new employer.

The Court of Appeals erroneously ruled that seniority was fixed as that of the date he entered the military service, and could not thereafter be changed "as long as the veteran remained in the employ of the company and as long as the Act remained in effect," and that the employer and the employees' bargaining agent could not, as a result of collective bargaining, change his seniority so that Whirls must be restored to February 8, 1935, seniority. This ruling was erroneous because the Act at most guaranteed the veteran rights for a period of not to exceed one year from the date of reemployment. At the end of that one year period the veterans' rights revert to and are derived from the National Labor Relations Act and collective bargaining.

Fishgold v. *Sullivan Drydock & Repair Corp.*, No. 970, October term, 1945, decided May 27, 1946, 66 Sup. Ct. Rep. 1105 held that Congress did not intend to give veterans greater rights than they would have had if they had not gone into the service. On the other hand, Congress intended to restore the veteran upon reemployment, to all of the rights he would have had if he had not gone into the service. The ruling of the Circuit Court of Appeals gives this veteran a greater right than he would have had if he had not gone into the service, because all of his fellow workmen who were similarly situated and who did not go into the service now have seniority as of January 1, 1944. The Courts of Ohio approved the collective bargaining contract which provided for former Highland employees' seniority as of January 1, 1944, the date they were entered on the payroll of Trailmobile, the new employer.

B. Seniority is not an inherent right of employment, but is a right pursuant to contract. Congress recognizes that seniority is a right, but does not set up any new or different seniority provisions than exist between the employees and the employer.

C. Chaotic conditions result in this plant because of the decision of the Circuit Court of Appeals, which gives this veteran greater seniority than a large number of his fellow workers.

Chaotic conditions will prevail generally if veterans are given different seniority than the seniority provided for in collective bargaining agreements entered into from time to time following demobilization and into the future.

D. The intent and purpose of the Act would be defeated by an affirmance of the lower court's decision because it would be necessary to discharge an employee after his one year of reemployment in order to prevent inequality among employees if he contended for the seniority he had when he entered the military service, notwithstanding the change of seniority provisions through collective bargaining after his one year of reemployment.

VIII. ARGUMENT

It is stipulated that respondent's status and pay are not in issue herein. It is further stipulated that his seniority was not changed from May 3, 1943 (the date of respondent's reemployment) until July 15, 1944, by either Highland or Trailmobile. On July 15, 1944, when the union contract was executed between the CIO and Trailmobile, his seniority was changed, as was the seniority of all other former Highland employees, to January 1, 1944, the date he was entered on the payroll of Trailmobile.

The only two paragraphs of the Selective Training and Service Act, as amended, in issue in this case are as follows:

"(b) (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

A. Analysis of Paragraphs (b) (B) and (c) of the Act

Since the Court of Appeals, in its decision, and the Solicitor General, in his Memorandum filed with this Court, seem confused as to the intent and meaning, as well as the actual wording of the above two paragraphs of the Act, the words and phrases thereof should be analyzed in detail.

Paragraph (b) (B) provides:

"... a private employer ... : shall restore such person (veteran) to *such* position *or* to a position of like seniority, status, and pay *unless* the employer's circumstances have so changed as to make it *impossible* or unreasonable to do so."[1]

[1] All emphasis and parentheses supplied where the provisions of the Act are quoted.

In this case Whirls was restored to *such* position by his employer. He had been a painter and was reemployed as a painter in the same paint department. There he was continued during the existence of his employer, from the date of reemployment, May 3, 1943, until December 31, 1943, when his then employer was legally dissolved. Thereafter, he could not continue for that employer because it had been dissolved and was no longer in existence. Notwithstanding the dissolution of his employer, he did not lose employment. Because the plant of his first employer was abandoned, he was moved to the plant of his new employer and continued in the paint department of the new employer at the new location with "*a position of like seniority, status, and pay.*" This condition continued from January 1, 1944, until July 15, 1944, and therefore continued more than one year beyond May 3, 1943 (date of reemployment). So that between the two employers he was *restored to such position AND to a position of like seniority, status, and pay* during more than one full year after reemployment, thus this part of the Act was fully complied with.

This paragraph (B) does not guarantee any length of time for seniority, status, or pay. Certainly it could not be successfully argued that it guarantees permanent or fixed status and permanent or fixed pay "as long as he remains in the service of the employer and as long as the Act remains in effect." How, then, can it be argued that this paragraph of the Act is different as to seniority? We contend that it is not different and that the Court below erred in finding that the Act guaranteed Whirls permanent or fixed seniority "as long as he remains in the service of the employer and as long as the Act remains in effect." In other words, under the terms of this particular paragraph, after the employee has been restored to *such posi-*

tion or to a *position of like seniority, status, and pay*, there is no statutory prohibition against the employer doing with such employee as circumstances then might require. His status could be changed, his pay could be changed, and so could his seniority without any violation of this paragraph (b) (B).

Without resorting to the last provision of (c), there would be no guarantee of *seniority* nor *status* nor *pay* for any length of time, but the last provision of (c) should and by construction has properly and repeatedly been held to fix status, and pay for a period of one year after such restoration, unless the veteran is discharged for cause.

Since paragraph (B) does not give Whirls what he contends for here, we must look at (c) to determine whether or not that part of the Act does give him what is contended for by Whirls, and which contention was upheld by the Courts below, to-wit: Permanent or fixed seniority that existed on date of induction with the armed forces.

(c) provides that the veteran

> "... *shall be considered* as having been on *furlough or leave of absence*, during his period of active military service, ..."

This does not imply the permanent fixing of seniority. No non-veteran employee *on furlough or leave of absence* could successfully contend about a subsequent change if, after his return to work, his employer's circumstances changed so that his services, status, or pay, or even his seniority was changed through collective bargaining with the collective bargaining agent. Here Whirls, upon his return and reemployment, was treated as though he had been *on furlough or leave of absence* because he was given his former job, former status, and former pay, and it was not until more than fourteen months after he returned from his furlough or leave of absence that his seniority but not his status and pay, was changed.

Then paragraph (c) continues:

"... shall be *so* restored *without loss* of seniority, ..."

At the expense of repetition, we say and it is conceded, that he was *so* restored *without loss* of seniority upon his return. This clause does not guarantee, either directly or indirectly, against any *subsequent* change which might occur, and particularly when it did occur through collective bargaining as provided by the National Labor Relations Act. Since he was "so restored without loss," therefore this provision of the Act was complied with. Upon restoration, there was no "loss of seniority" and he continued in his former seniority position for more than fourteen months after such restoration.

Respondent stipulates that he was "restored without loss" but contends that the word "so" preceding the word "restored" refers to and requires a construction that whatever seniority he had upon entering the military service is thereafter fixed as long as he remains in the employ of the employer and as long as the Act remains in effect. This is a strained, if not ridiculous, contention.

The words "without loss of seniority" are preceded by the words "so restored" and qualify and limit the application of the words "without loss of seniority" to the time implied in the words "so restored." There is no express provision of the Act fixing any seniority rights of the returning veteran, after such restoration, as of any later definite or determinable date, or so long as the Act remains in effect, or so long as the returning veteran remains in the service of his employer, unless it be the one-year provision which was fully complied with in this case. There is nothing in the Act which necessarily or reasonably intends or implies such broad, indefinite, and comprehensive periods of time, after the restoration of his position, as was held by the courts below.

The next clause of (c):

> ". . ., shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees *on furlough or leave of absence* in effect with the employer at the time such person was ordered into such service, . . ."

There is no issue in this case regarding insurance or other benefits, neither is there any claim that he was entitled to anything under this particular clause of the statute. It is a complete clause, as shown above, within commas. However, it is significant to note that the Act gives the veteran the right to participate in insurance or other benefits offered by the employer, which the employee would have been entitled to *had he been on furlough or leave of absence*. In other words, it is again clear that the Congress intended that the veteran be restored to the exact "*position which he left, plus accumulated seniority.*"[3] *Fishgold v. Sullivan Drydock & Repair Corp.*, No. 970, October 1945 term, 66 Sup. Ct. Rep. 1105. This Court likewise held in that case:

> "But we would distort the language of these provisions if we read it as granting the veteran *an increase in seniority over what he would have had if he had never entered the armed services.*"

and again:

> "What it undertook to do was to give the veteran protection *within the framework of the seniority system*, plus a guarantee against demotion or termination of the employment relationship without cause *for a year.*"

[3] Emph. is supplied in all quotations from the *Fishgold* case.

Certainly this clause of (c), neither separately nor in conjunction with any of the other clauses of the Act, gives additional rights to the veteran which he would not have had if he had not entered the armed services. As to that point this Court said, "No step-up or gain in priority can be fairly implied." To fix seniority for duration of employment or the Act that of date of entering the military service would definitely give him "gain in priority" over that of his fellow workers, because he would have a different and greater seniority than others under the new collective bargaining agreement.

Lastly and for the first and only time in the Act (c) concludes:

> ". . . , and shall not be discharged from *such* position without cause within one year after *such* restoration."

Even if this clause guarantees the returned veteran's seniority position in the "seniority system" as of the date of induction, it does so for a period of one year and one year only. After the end of that one year the employee's rights revert to the protection afforded by the N. L. R. A. and the guaranteed right of collective bargaining.

Without the Act an employee leaving the employment of the employer for any reason, including joining the armed forces of the United States, would have lost his job and his seniority status. Upon discharge from the armed forces, he would have been a new employee of the company with seniority as of that date of hiring. The purpose of the Act, we submit, was to prevent such a result. And this court so held by saying in the *Fishgold* case:

> "Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority *means no more*.

> "Nor can we read into the guarantee against discharge 'from such position' a gain or step-up in seniority. *That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. . . .* But the guarantee against discharge does not on its face suggest the *grant of a preference* to the veteran over and above that which was accorded by the seniority of 'such position.'"

The Act does not in words or by implication guarantee seniority for any period of time, but provides that the employee shall be restored by the employer without loss of seniority and "shall not be discharged from such position without cause within one year after such restoration." There being no guarantee of employment longer than one year, there could not, therefore, be a continuing guarantee of seniority for a period longer than that one year. Thereafter, such employee's rights of employment were and are protected by the National Labor Relations Act and collective bargaining rights thereunder.

From the detailed analysis of the clauses of paragraphs (B) and (c), we submit that it is perfectly clear that the Congress neither directly nor indirectly intended to add rights for the veteran which he would not have had if he had not gone into the military service, but did intend to "*give the veteran protection within the framework of the seniority system, plus a guarantee against demotion or termination of the employment relationship without cause for a year.*" *Fishgold* case, supra.

Contrary to the Solicitor General's argument at Memorandum, p. 6, and to the lower Court's decision, seniority is not a "benefit separate and distinct from the other benefits conferred by" the Act. It is certainly not separate and distinct from *status* and *pay* in the Act. Would he argue that *status* and *pay* are fixed as of the date of induction and could not be changed *after* one year's re-employ-

ment? Even if the Court below and the argument at page 7 are correct, that the Act takes precedence over the Wagner Act, it could only do so for a period of one year. Thereafter, the benefit of the Act expires as to that veteran and the Wagner Act would stand alone as the employee's protection. And even if the collective bargaining agency could not bargain away rights under the Selective Training and Service Act, that restriction would last for only one year. Here we are not concerned with what would happen DURING the one year from reemployment, but solely with the question as to the veteran's rights under the Act AFTER that one year.

The Solicitor General (Memorandum p. 6) misconstrued the meaning of the quotation from the *Fishgold* case as applied to the facts of this case. We contend here that "He steps back on (the seniority system) at the precise point he would have occupied had he kept his position continuously during the War."[8] We contend that the agreements between the employer and the CIO union do not cut down the service adjustment benefits which Congress secured to the veteran under the Act. Therefore, the decision of this court, that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act," is not applicable to this case because the "agreement" was made after the one year of reemployment.

We submit that the Court below misconstrued the intent and meaning of the Act and gave added rights to Whirls which the Congress did not intend; that the Act should be construed in accordance with its meaning and in accordance with this court's decision in the *Fishgold* case.

[8] Quotation from *Fishgold* decision used by Solicitor General.

B. Seniority Is Not an Inherent Right of Employment

Under the law of Ohio and quite generally, seniority is not now nor has it ever been an inherent right of employment nor an unchangeable right. The weight of authority in this country is that seniority is not an inherent right of employment but is a matter of contract. The courts of Ohio finally determined this point in the *Hess* v. *Trailmobile* case (R. 54-55), wherein Whirls was *named* as one of those similarly situated with Hess and wherein the courts held:

> "2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union . . . and such seniority rights can not arise merely by reason of the fact that an employee has worked for an employer for a number of years, unless the employer and the employee have so contracted" (R. 54).

Thus, and as is frequently done through collective bargaining, seniority rights are changed from time to time. It is a commonly known fact that from year to year labor contracts change seniority from a plant-wide to a departmental basis and back again with innumerable refinements and interpretations which affect great numbers of employees.

The *Hess* v. *Trailmobile* case finally determined a lawful "seniority system" for Trailmobile. Below we contended that the *Hess* case was res adjudicata of the issue herein presented. That court found against us on that issue and as the Attorney General comments on Memorandum, p. 5, the issue is not raised in this court. However, we submit that the courts of Ohio held against there being discrimination as to the former Highland employees, and that case does establish the law as to that point. Since Whirls was employed for more than one year before the collective bargaining agreement was changed to affect his seniority, we

submit that Whirls was in no better position than any non-veteran employee at the time of the change in the collective bargaining agreement, and that there could be no discrimination under the decisions of the Ohio courts, Whirl's one-year guaranteed reemployment status having been complied with.

Since seniority is not an inherent right of employment; and since there was no discrimination, Whirls could not inject such an issue here at this late date, as the Solicitor General seems to attempt in his Memorandum, toward the bottom of page 7. Furthermore, since the Act does not create a new seniority system, his protection is under the N. L. R. A. and collective bargaining.

By the foregoing argument we do not imply that there is no such thing as a seniority system or rights. As this court said in the *Fishgold* case,

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is, indeed, no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system, plus a guarantee against demotion or termination of the employment relationship without cause *for a year.*"

Thus our contention is that the seniority system is one of contract and the rights to seniority are derived from contracts. The Act did not protect the veteran beyond the year, consequently his rights are, after that one year, under the contracts which the company negotiates with the collective bargaining agency of the employees under the N. L. R. A. Since seniority is not an inherent right; it can only confer upon employees such rights as the collective bargaining agreement provides, so that Whirls is only entitled to seniority as of January 1, 1944.

C. Chaotic Labor Conditions Will Result if the Court Below Is Affirmed

The immediate effect of the decision of the lower courts in this particular plant is that it elevates a small number (approximately forty) of former Highland veterans on the seniority ladder above a large number (approximately 400) of Trailmobile veterans. It also raises these forty former Highland veterans above all of the former Highland non-veterans, since the latter's seniority status has been approved by the Ohio courts as of January 1, 1944. Furthermore, these forty former Highland veterans are placed above the large majority of the Trailmobile non-veterans who were employees of The Trailmobile Company, a younger and more rapidly expanding company than was the Highland Company. Following the decision below labor strife became so intense that Trailmobile, in order to avoid a strike, filed a Declaratory Judgment suit in the United States District Court to determine the seniority rights of all the various classes of veteran and non-veteran employees and seeking to enjoin the Selective Service System, the United States District Attorney, the Union, and all the employees from taking any action until the question was finally determined. That case is now pending before the United States Circuit Court of Appeals on the issue as to whether or not the court has jurisdiction over a Declaratory Judgment suit which raises questions involving the Selective Training and Service Act.

The effect of the decision of the Court below, from the broad viewpoint of all employers, would be that veterans' seniority would be fixed as of the date they entered the military service. Since men were inducted into the military service over a period of four years, it is probable that returned veterans in one plant would have different seniority each from the other, depending upon date of induction and

depending upon changes of seniority provisions in succeeding contracts. They might have left employment "on furlough" for military service under a contract providing for plant-wide seniority, then, after one year's reemployment during the course of years, the majority of a particular veteran's fellow-employees might desire and get a change of seniority from plant-wide to departmental or vice versa, and, notwithstanding that such majority was made up of fellow veterans, any single veteran could say, "No, I have a guaranteed fixed seniority as of the date I entered the service." The chaotic conditions resulting from such situations could be enumerated at length.

D. The Intent and Purpose of the Act Would Be Defeated by the Lower Court's Decision

Turning to the evil resulting from an affirmance of the decision below, we submit that the intent and purpose of the Act would be defeated by such a construction—in that, the majority of the employees and/or the collective bargaining agent and/or the employers would have a common interest in bringing about the discharge of veterans after a year, in order to prevent inequality and injustice among the workmen of a plant should the veteran contend for such a fixed seniority. Certainly there is nothing in the Act, nor has it ever been contended, that the employer could not discharge a veteran after one year. The Solicitor General, in his Memorandum, on page 8, points out how this not only could happen but has almost happened. The union here demanded that Whirls be discharged after he was expelled from the union. The union served notice on Trailmobile that unless Whirls was discharged, the employee-members (about 1,400, being all of the employees of the plant) would strike. In order to prevent a strike, the company was forced to give Whirls a leave of absence with full pay, which condition continues, and will continue until a final determination of this case.

IX. CONCLUSION

We submit that the benefits conferred upon Whirls under the Act were fully complied with because he was restored to his former position upon his discharge from the Army. He was given the seniority, status, and pay he would have had if he had not gone into the military service. These benefits were given to him for a period of more than one year after his reemployment. To fix seniority as of date of induction for "as long as the veteran continues in the service of the employer and as long as the Act remains in effect" would result in chaotic labor conditions, and would defeat the intent and purpose of the Act because the veteran might have to be discharged after his one year of reemployment.

It is respectfully submitted that the construction of Section 8 contended for by Petitioners is consistent with the language of the Act, consistent with its legislative history, and the decision in the *Fishgold* case, and consistent with principles of justice and fair play, both as regards returning veterans, non-veteran workers, and employers, and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

U. S. C. A. TITLE 50, APP. § 308. As amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

U. S. C. A. TITLE 50, § 308. As amended July 28, 1942, c. 529, § 2, 56 Stat. 724.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military

service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration.

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In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 85

THE TRAILMOBILE COMPANY
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, UAW-CIO, LOCAL No. 392,
Petitioners,
vs.
LAWRENCE WHIRLS,
Respondent

REPLY BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA UAW-CIO, LOCAL 392

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REPLY BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA UAW-CIO, LOCAL 392

The heart of Respondent's argument is that Section 8 (b)(B) of the Selective Service and Training Act of 1940, which provides that an employer shall "restore" a veteran to "such position or to a position of like seniority, status, and pay * * *" implies restoration to "a continuing relationship between employer and employee."[1] From

[1] Respondent's brief, page 26.

this premise, Respondent argues that "since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ."[2]

To arrive at this interpretation of the statute, the Respondent seeks to define the word "restore" to mean something more than the original act of placing the veteran in the same position that he would have had if he had not been inducted. The Respondent would have this court define the word "restore" to encompass the full term of the relationship between the employer and the veteran, from the date on which he was re-employed to the date of his final separation.

That Congress intended by the phrase "restore to such position" to mean only the original re-employment of the veteran, is made abundantly clear by Section 8 (b)(c). In this Section, Congress provided that the veteran "shall not be discharged from *such position* without cause within one year after *such restoration.*" Congress certainly intended that the words "such position" and "such restoration" as used in this subsection, should have the same meaning as the words "restore" and "such position" as used in Section 8 (b)(B). Therefore, if Respondent's definition of these words is correct, it should make sense when applied to either section of the Act.

When we apply Respondent's definition to Section 8 (b)(c), we obtain a meaning other than has been attributed to it by the courts or even by Selective Service, and contrary to the plain intent of its language. Section 8 (b)(c) has been universally construed to mean that Congress prohibited the discharge of a veteran without cause for

---

[2] Respondent's brief, page 29.

one year after the date of *his re-employment*. Even the Respondent conceded this meaning for Section 8 (b)(c).[3] Thus, the prohibition against discharge for one year from the date of the veteran's "restoration" to "such position" means one year from the date on which the veteran was re-employed.

But Respondent now contends that "restoration to a position in the employ of the employer necessarily implies a continuing relationship between employer and employee, and cannot be merely a single one-time obligation which is entirely fulfilled when the employer places the veteran's name on his rolls, or the first time the veteran comes to work."[4] Under this definition, the "one year" prohibition against discharge would run from some indefinite date included within the period of "continuing relationship" between the employer and the veteran. We do not believe that such a meaning can be read into Section 8 (b)(c). Consequently this meaning cannot be read into the same words when used in Section 8 (b)(B).

In the *Fishgold* case, this court did not have under direct consideration the precise question raised here, but there is an implicit assumption in the opinion that the "restoration" to "such position," required by the Act, referred to the original re-employment of the veteran rather than the "continuing relationship" contended for by the Respondent. The following language of the court in the *Fishgold* case supports this view:

> "We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as

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[3] This interpretation is taken for granted by Respondent throughout its brief. See pages 22, 43.

[4] Respondent's brief, page 26.

> was possible. No step-up or gain priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

If, as the Respondent contends, Section 8 (b)(B) protects against any change in his employment relationship for an indefinite period following his reinstatement, it is difficult to understand the reason for Congress adding the one year's protection against discharge in Section 8 (b)(c). According to Respondent, the veteran is fully protected against discharge or demotion without cause, not only for one year after his reinstatement, but for the duration of his employment. This interpretation would seem to make the protection against discharge for one year redundant. Yet in the *Fishgold* case, this court found that the prohibition against discharge for one year constituted an important element in the protection of the veteran's re-employment rights.

We do not believe that Congress intended to be redundant. We belive, rather, that Congress intended by Section 8 (b)(B) to give the veteran all his seniority rights upon re-employment, so that he would stand in the same position with respect to other employees as though he had not been inducted and, as a further protection, provided by Section 8 (b)(c) that he could not be discharged without cause for one year. Only by this construction can both sections be harmonized.

Under Respondent's construction of Section 8 (b) (B), the seniority position which the veteran held at the time of his *induction*, may not thereafter be changed adversely, at least without his consent. Yet it is often necessary to effect changes in seniority systems, due to such factors as:

The growth or decline of the bargaining strength of the workers, the change in the nature of the plant operations, the failure of the existing system to function fairly, the elimination of operations or of a department within a plant, the change in the composition of the labor force within the plant, the transfer of operations to another building, etc.

The decision of the lower court would compel employers to maintain, for every veteran, the seniority status which he held on the date of his induction, despite all subsequent changes which may occur in the particular plant or industry. This clearly appears from the lower court's opinion:

> "As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces."

Since the employer and the union may not "bargain away" the seniority rights of a returned veteran, it is clear that any subsequent change in the seniority rules affecting all employees alike, desirable as they might be, would be in violation of the law if they adversely affected the status which the veteran held at the time of his induction.

In an effort to avoid this logical but impractical implication of its strained construction of the Act, the Respondent advances an argument which requires it to rewrite the language of the Act:

> "Protection against unfavorable changes in employment conditions is afforded indefinitely. This

> is not to say, however, that the veteran's job is absolutely frozen forever, in all its incidents. The statute assumes change, as new circumstances actually require, though not at the whim of the employer or of a hostile union. *Section 8 (b) (B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to maintain the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment.*"

The Respondent first adopts an illogical and unnatural definition of the phrase "restore to such position" in order to justify its position in this case. It then finds that the inescapable logic of its argument places it in the untenable position of permanently freezing the seniority status of all veterans within the framework of a fluid seniority system necessary to our constantly changing industrial economy. It is then forced to escape from the dilemma thus created by rewriting the law.

Section 8 (b)(B) requires an employer to "*restore*" a veteran to his position "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." The Respondent now reads this plain language to say "Section 8 (b)(B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to *maintain* the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment."

Thus, without explanation but nevertheless with the assurance that it is "clear," the word "restore" becomes "maintain," and Congress is committed to a policy of permitting seniority changes affecting veterans only where a court finds that it is reasonable.

We submit that no such policy is indicated in the history or language of the Act. And the implications of such a policy are far reaching, since for an indefinite period, it will prevent the natural development of the seniority system which in the end is the most effective protection for all workers including veterans.

Respectfully submitted,

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No. 85

October Term, 1946

IN THE

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THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO,

Petitioners,

v.

LAWRENCE WHIRLS,

Respondent.

REPLY BRIEF OF PETITIONER, THE TRAILMOBILE COMPANY

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REPLY BRIEF OF PETITIONER, THE TRAILMOBILE COMPANY

An analysis of the Government's Brief on Behalf of Respondent discloses:

I. That some points are argued which are not at issue in this case;

II. That there are inconsistencies and factual misapprehensions;

III. That the legislative history not only does not support respondent's contention of fixed or permanent seniority, but to the contrary indicates Congressional intent to "restore" seniority rights held at the time of induction just as if the veteran had not gone in the service and no more; and,

IV. A failure to give effect to the contractual provisions between the petitioner-employer and the co-petitioner collective bargaining agent for and on behalf of respondent existing not only when respondent went into the service, but when he was re-employed and thereafter.

Replying to the brief, we will discuss these four points separately, in the above numerical order.

I

POINTS NOT IN ISSUE ARGUED IN GOVERNMENT'S BRIEF

The Government's brief for the respondent argues much that is not involved in this case.

1st. No question arises as to any change in respondent's seniority rights within one year of re-employment. What the rights of the veteran are within that period can and should await determination in a proper case involving such questions. That case will necessarily depend for its solution on the terms of the governing contract or system which established the veteran's seniority rights, as well as other rights, at the time of his induction into the service. It is contractual seniority rights to which the Act requires his restoration, and Congress by requiring such restoration gives him the protection of the terms thereof, and no other protection is necessary. The Act neither expressly nor by implication denies the right to bargain collectively periodically to meet circumstances and conditions as they arise.

2nd. No question of pay and status is here involved and the somewhat difficult questions that other cases may present manifestly cannot be solved on this record.

3rd. Neither is involved arbitrary action on the part of the employer nor the Union. Seniority here is based on contract, and here the employer has a collective bargaining contract which was held by the Ohio courts to be lawful and not arbitrary.

4th. Neither is the action of the respondent's lawfully accredited bargaining agent in making the contract of 1944 of which respondent complains one that was made to settle only the seniority of veterans. It established as of January 1, 1944, the seniority of every Highland employee who then entered the employment of Trailmobile, each one of whom before that date depended for his seniority on the agreement introduced for respondent on the hearing as Plaintiff's Exhibit C (R. 21). That agreement fixed seniority of Trailmobile employees also. It determined respondent's seniority with reference to the employees of both companies. The action of the bargaining agent was in settlement of a bitter dispute between the employees of the two companies, necessitated by the change in circumstances resulting from the discontinuance of Highland as an employer. The history of this dispute is found in the opinions of the National Labor Relations Board in 51 NLRB 1106 and 53 NLRB 1248, cited in respondent's brief, which refer to the decision of the Regional War Labor Board, The Trailer Company of America, 9 W.L.R. 809, which decision was reversed after the election had been ordered in 10 W.L.R. 374.

5th. Neither is there involved herein any question as to insurance or other benefits, the extent of which can only be determined in a case involving them by the "rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person (veteran) was ordered into such service" [U. S. C. A. 50, § 308(c)].

II

REPLIES TO RESPONDENT'S PRINCIPAL ARGUMENTS

Respondent's brief contains many inconsistencies and factual misapprehensions.

1st. In answer to our contention at pages 15 and 16 of our brief that the returned veteran's status and pay could be changed after one year's employment, the brief for respondent at page 35 states that in the view of the authors, "the Act does not differentiate, as to duration of the employer's obligation, between pay, status, and seniority," and on the next page points out that it is entirely possible to interpret Section 8 as placing seniority on a different plane from pay and status.

2nd. To make this difference, seniority rights, at page 36, are treated as "relatively stable, ordinarily do not fluctuate with industrial conditions as wages do, nor is there usually much need for change." The contrary appears from the history of this controversy as shown by (a) the decision of the NLRB and the WLB in 51 NLRB 1106 and 53 NLRB 1248 and that of the Regional War Labor Board, 9 W.L.R. 809; (b) the merger here of employees of separate companies; and also by (c) the experience of railroad employees as pointed out in the brief of Railway Labor Executives Association as amicus curiae.

3rd. The argument is made that because restoration requires continuity of service that therefore Congress must have intended the rights granted, especially those of seniority and insurance and other benefits, to continue perpetually notwithstanding the fact that the Act only protects the veteran in his employment for one year, as within that one year the veteran can neither be discharged, or, as this court indicates in the *Fishgold* case, demoted, without cause. There is no limitation on the right to discharge thereafter. If the argument be so far correct as that the word "restore" denotes continuity of employment, Congress limits its concern with such continuity to one year.

4th. As the right to discharge is inherent in the relation of employer and employee, except as limited by contract or by statute, it is impossible to graft onto the clause

restraining discharge without cause within one year, limitations on the right to discharge after the year as the brief for respondent repeatedly does.

5th. The argument for respondent is that the clause in Section 8 (b)(B), "unless the employer's circumstances have been so changed as to make it impossible and unreasonable to do so," is a clause applicable after restoration, and concludes therefore that a requirement for perpetual employment on the terms existing on the date of induction is reasonable because Congress has modified the requirement so as to warrant change in terms of employment whenever during the re-employment employer's circumstances have changed making it impossible or unreasonable to continue the employment on such terms. Congress has made no such qualification applicable during the continuance of the restored employment; the clause is limited solely to a qualification of the right to restore. It is apparent that counsel for respondent in order to support the argument for perpetual rights are driven to the necessity of writing a new law.

At pages 44 and 45 counsel read into the statute provisions for changes of terms after re-employment,

> "as new circumstances actually require, though not at the whim of the employer or a hostile union. . . . Necessary reductions in force caused by changed production requirements or altered economic conditions can be made. Technological advances warrant certain shifts in personnel requirements, and *similar substantive changes in industrial techniques and practices may make it unreasonable to continue a veteran in status quo.* In the case of seniority rights, it is unlikely that many changes will normally be required." (Italics supplied.)

We contend the circumstances in this case fall exactly within the words above which we have italicized. There

was certainly a change in industrial techniques and practices when petitioning company took over the assets and employees of the Highland Company which was dissolved. If their argument is sound, then certainly the merger of two plants along with the merger of the employees and their separate contractual rights, is a changed circumstance within the meaning of that clause. This respondent admits at page 62. (See infra, p. 10.)

The observation in the last sentence quoted that it is unlikely that many changes in seniority will normally be required can hardly be construed as a contention that when required they cannot be made. There certainly is nothing in the Act which makes seniority rights unchangeable when the changes are not applicable to veterans alone but to a whole body of fellow employees. As pointed out in Section IV of this brief, the changes in practices did make necessary a reconsideration of the question of seniority.

6th. Counsel at page 48 of the brief misinterpret our failure to argue in respect to a situation not before the court as evidence that collective bargaining cannot interfere with the veteran's rights during the first year of reemployment and that that admission somehow strengthens their contention that collective bargaining can never change the seniority rights of the returned veteran. Manifestly because of Section 16 (a) of the Selective Service Act [50 U.S.C.App. § 316(a)] the National Labor Relations Act is suspended to the extent, and only to the extent, that there be conflict between the two. The provisions of the National Labor Relations Act must prevail with respect to the veteran restored to his preservice position, as with respect to all his fellow employees, unless the Selective Service Act clearly otherwise provides. The presumption is that the two acts are harmonious. To make a conflict respondent's counsel are driven to the necessity of arguing that Con-

gress intended the seniority rights to be perpetual. The natural inference would be that, unless expressly otherwise provided in the Act, the seniority right to which he is restored, being itself the result of collective bargaining pursuant to the National Labor Relations Act, would continue to be subject to such bargaining—at least after the one year's re-employment during which he could only be discharged for cause.

7th. At page 50 of the brief it is argued that respondent's joining the union was compelled and because of that compulsion he cannot be held to have assented to the union agreement. Under the terms of the National Labor Relations Act, the agreement of the Union as the duly certificated bargaining agent bound the company and all its employees whether members of the union or not. *Elder* v. *N. Y. C. R. Co.*, 152 F. (2d) 361 at 364 (6th Circuit).

8th. On pages 59 and 60 of respondent's brief, it is argued that the recent re-enactment and amendment of the Act continuing Section 8 indefinitely is particularly significant as an indication that Congress intended to perpetually freeze the seniority status as of the date of entrance into service. We submit that no such intention may reasonably be inferred from the amendment. Attention is invited to the fact that the recent re-enactment and amendment of the Act (Act of June 29, 1946, Public Law 426, 79th Congress, second session, c. 522) not only continues Section 8 indefinitely, but also continues Sections 3 (b), 3 (c), 3 (d), and 16 (b) for indefinite periods. Section 3 (b) provides in substance that each man inducted on and after October 1, 1946, shall serve a period of service and training of eighteen consecutive months, and that any man inducted prior to October 1, 1946, who shall have completed a period of training and service of eighteen months or more shall, *upon his request*, after such date, be relieved of his period of training and service under the Act.

It further provides that notwithstanding any of the provisions of the section, whenever, after January 1, 1946, the Congress declares that the national interest is imperiled, such period of training and service may be extended by the President to such time as may be necessary in the interest of national defense. Therefore, since Section 3 (b) was made permanent, it is quite clear that men inducted both before and after October 1, 1946, may be returning to civilian life over an indefinite period of time in the future, since they may not desire to be released immediately upon the completion of eighteen months' service. As a matter of fact, men in the service for eighteen months or over who are eligible for discharge may and probably will be encouraged to remain in the service for additional periods of time because of their particular training or geographical location, at the time of completion of eighteen months' service. Such was the case after the cessation of hostilities in World War II when men with sufficient points to warrant discharge were requested, in many instances, to remain in service for additional periods of time in order that an undue hardship on the Army's program might not be occasioned by their request for discharge. In view of the fact that the indefinite extension of Section 3 (b) meant that inductees would be returned to civilian life over an indefinite period of time in the future, it was only logical that Congress should also extend Section 8 indefinitely, in order that these men might be assured its protection as they returned to civilian life.

We submit that this is quite clearly indicated by Chairman May in the sentence following the one quoted in respondent's brief on pages 59 and 60. Chairman May went on to say [92 Cong. Rec. 3659 (daily ed.)]:

> "I might add, however, that we have pending before the Committee now a separate bill, the purpose of which is to make that a permanent statute so that men

will have priority on their jobs *as they go back after they are in the service.*" (Italics supplied.)

In view of the long period of time in the future during which inductees may request and receive their discharges; in view of the indefinite extension of Section 3 (b); and in view of the language of Chairman May above quoted, we submit that by its indefinite extension of Section 8, Congress intended merely to extend the protection of said section to inductees "as they go back after they are in the service," and there can be no inference that Congress intended to permanently fix the seniority status in existence at the time the inductee entered the service.

9th. Respondent's brief takes issue with some language in our original brief to the effect that Section 8 did not enlarge the rights of the returned veteran over those which he would have had had he not gone into the service. We were speaking only of his seniority rights. We appreciate that this court has said in the *Fishgold* case, "he was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind," but those advantages are enumerated in the succeeding paragraph of the opinion as four in number. Respondent had the benefit of each of those four advantages. The court certainly did not enumerate as an advantage over the stay-at-home employee that the returned veteran's seniority rights would remain fixed in perpetuity notwithstanding the subsequent change in seniority of his stay-at-home fellow employees legally established by the duly certified bargaining agent.

10th. Throughout the forepart of respondent's brief, it is argued flatly that seniority is and should be fixed and permanent as of the date of induction. At page 19:

"The crucial right here is that a restoration to a position with at least the same seniority as the pre-service job. That right, and the correlative obligation of the

employer to restore the veteran to such a position, are continuing ones, which the statute, properly and fairly construed, extends beyond the first year of re-employment."

At page 21 they argue that the veteran steps back on the seniority escalator at the point he would have occupied had he kept his position steadily during the war, "even though interim changes might have altered the accrual rate of his seniority rights." And again at page 22:

> "The veteran was to have the fixed and accustomed starting point of his old job from which to begin his economic readjustment to civilian life."

At page 29:

> "And since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ."

Thereafter, respondent is confronted with the dilemma of protecting that fixed and permanent right to the Trailmobile veterans as distinguished from respondent and his fellow-Highland workers, and they have to concede at page 62 that

> "As for the Trailmobile veterans with inferior seniority, it is true that Whirls' reinstatement makes it impossible for them to receive exactly the same seniority status as they previously had, but, in all probability, Whirls' position on the consolidated seniority roster is likewise somewhat changed because of the merger. It is that which has made it impossible to restore each veteran to his exact place on the seniority lists, but there is no reason to believe that the minor adjustments in the standings necessitated by the consolidation are substantial enough to derogate from either Whirls' or the Trailmobile veterans' rights."

Then they admit that Section 8 (b)(B) "entitles them only to a position of like seniority—*not a position of precisely the same seniority but of substantially the same.*" (Italics supplied.)

Thus, conceding that the statute does not require a "position of precisely the same seniority," what is to be the measuring stick for "like" seniority? Having read into the statute an iron-bound rule, they are forced, by the circumstances of this case, to modify it. The only way such question can be determined is through collective bargaining as was done in this case.

11th. By constant repetition of the argument under (b) (B) of the Act the Government attempts to construe seniority as permanent and inviolable. However, the statute provides in (b) (B), ". . . such employer shall restore such person to such position or to a position of like seniority, status, and pay. . . ." Therefore the permanence construed to seniority must likewise be construed to "status" and "pay." This would mean that regardless of fluctuating wage rates or collective bargaining agreements, the employer would have to pay the veteran forever the same wages he received when he entered the Army. The impossibility of such a construction is apparent on its face. Furthermore, that provision of the Act continues, ". . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;". To avoid this impossible construction, this latter quoted provision has been invoked by the Government as of continuing applicability after re-employment. But, it is equally applicable to the three terms, "seniority," "status," and "pay." Certainly, the primary purpose of the clause is to limit the necessity of restoration to a position, and it is not possible to confine such limitations to the matter of "status" and "pay."

III

THE LEGISLATIVE HISTORY OF THE ACT DOES NOT INDICATE THAT CONGRESS INTENDED TO PERMANENTLY FIX SENIORITY RIGHTS

Notwithstanding the argumentative presention of legislative history on pages 51 through 59 of the brief, the words quoted from the Congressional Record appear to uphold petitioner's contentions more effectively than they do respondent's contentions. The general import of the words therein quoted is that the veterans shall be "restored" and such restoration shall be to a place where he left off. There are no words explicitly saying nor even indicating that restoration means other than putting him back where he would have been had he not gone into the service, nor can respondent point to any words which say or indicate that the returned veteran acquires greater rights to seniority than he would have had if he had not gone into the service.

In tracing the history of Section 8, respondent's brief itself discloses that the first committee drafts stated the Congressional purpose to be that every returnee should be re-employed without "loss of seniority." Therefore, from the very beginning, Congress was thinking in terms of guaranteeing only a retention of whatever seniority rights were in existence when the men went into the service and there is no intent manifest to broaden the seniority rights which were being enjoyed at the time service was entered. Clearly the rights which Whirls had to seniority could be changed by subsequent contracts as was done, with the approval of the Ohio courts, for all Highland employees.

On page 54 of respondent's brief, there appears a quotation from the explanation of the seniority provisions as made by the Chairman of the House Military Affairs Committee, during the House discussion on the National Guard

Act. In such quotation the purpose is stated to "restore" the returnee to his same seniority status. In other words, the returnee was to be given back what he had at the time he left his employment to enter service and nothing is said about any intention to permanently fix his seniority privileges upon his re-employment. Therefore, it would not appear that the Congress had any intention of augmenting seniority benefits at the time it passed the National Guard Act. Subsequently the re-employment provisions of the National Guard Act were carried forward into the Selective Training and Service Bill with a further amendment elaborating paragraph (c) to its present form. Such amendment to paragraph (c) in effect significantly provides that the returnee shall be considered during the period of service as though he were on furlough or leave of absence from his employment. Obviously if the respondent, Whirls, is considered as having been merely on furlough or leave of absence from the Company, then upon his re-employment his seniority rights would in no wise be enlarged.

On page 56 of respondent's brief, there appears a quotation from Chairman May explaining the purpose of the amended section (c) as inserted in the Selective Service Bill. This explanation was made in reply to a question from the floor of the House as to whether the section would compel employers to pay Social Security and other taxes while the employee was in the armed forces, and Chairman May replied that the chief purpose of the amendment is to "preserve" the seniority rights of employees. Here again the congressional intent is shown to "preserve" rather than to augment and forever fix the seniority rights of those men who entered the armed forces.

The same intention evidenced by the quotation in explanation of and debate on the National Guard Bill, and the Selective Service Bill in the House is evident also

from a reading of the discussion of the bills before the Senate. In explaining the conference report on the National Guard Bill, Senator Shepherd stated (86 Cong. Rec. 10791):

> "In the same connection the House had an amendment, inserting the word 'seniority', before the words 'status and pay' wherever such words occurred in such paragraphs. This was to make certain that seniority employment rights are *maintained*. The Senate agreed." (Italics supplied.).

At the bottom of page 56 and the top of page 57, respondent quotes from Senator Shepherd (86 Cong. Rec. 10095) but failed to quote a further statement by Senator Shepherd as follows:

> "Section 8 attempts to offer a trainee or Reserve officer on active duty as much protection with respect to re-employment and retention of employment benefits *as is within reasonable bounds*." (Italics supplied.)

Again, in explaining the amended paragraph as proposed in the Selective Service Bill, Chairman May stated (86 Cong. Rec. 10914):

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as though he were on furlough or leave of absence in private life. It seems to me to be a good suggestion."

In fact all of the citations cited by the respondent and all of the discussion which we have been able to find in the Congressional Record clearly demonstrates the intention of Congress to preserve and maintain the status quo of seniority rights so that the employees would return to their jobs with the same rights of seniority as when they entered the service, and nowhere is there any statement made nor intention shown of increasing or of permanently fixing the seniority benefits so that they may become immutable after the entry into service.

IV

RESPONDENT'S BRIEF FAILS TO GIVE EFFECT TO RESPONDENT'S CONTRACTUAL RELATIONS WITH REFERENCE TO SENIORITY

The respondent after his discharge was given back his old position with all the seniority rights annexed to that position. These seniority rights are found in Plaintiff's Exhibit C (R. 21-23) which was the identical contract under which he worked when he was inducted and under which he came back to work after discharge. That contract was so drawn as to protect the employees of the Highland plant and also of the Trailmobile plant from loss of seniority due to invasion into their plant by employees of the other. Art. 13 of that contract (R. 21), permitting transfers from one plant to another in preference to hiring new men, provides:

> "Employees so transferred from one plant to another, when called back to the plant *at which they hold seniority* may return. . . ." (Italics supplied.)

By Art. 14, Section 1, the departments of each plant were separate from the departments of the other. Section 2 (R. 22) provides, "Seniority shall be departmental."

Section 5 provides, "But any or all employees transferred temporarily shall become the junior to all employees in the department to which transfer is made."

Section 6 provides, "Any employee may transfer permanently to another department, but will become junior to all employees on the seniority list in the department to which transfer is made."

There was no provision in the contract of 1942 on which Highland employees could rely to give them seniority over Trailmobile employees. The agreement fixed the seniority of the employees of each plant.

If the agreement is broad enough to cover the transfers made by the Company from Highland to Trailmobile, manifestly the agreement made the respondent junior to all Trailmobile employees in that department to which he was transferred. *If the agreement did not provide for such transfers made by the Company, there was no agreement giving him seniority in the Trailmobile plant.* The AFL Union ruled that Highland employees were entitled to seniority in each comparable Department of the Trailmobile Company ahead of all the Trailmobile employees in that department.

The Trailmobile employees deemed this to be in violation of the rights secured to them by this same agreement on which respondent relies. They broke away from the AFL Union, were given the right to a new election to determine their bargaining agent, and as a result of that election, the CIO Union, one of the petitioners herein, was chosen and certified as the bargaining agent for the employees of both companies and bargaining followed between that bargaining agent and the company, resulting in the 1944 agreement, more than fourteen months after respondent's re-employment. The Hess suit followed as a class suit to determine the validity of that agreement so far as it affected the seniority of all the Highland employees. It was a class suit for the benefit of all such employees all of whom, including the respondent, were named in an exhibit to the petition (R. 37). It may be that since the plaintiff, Hess, was not a returned veteran, the judgment in the class suit did not determine the question argued here as to whether or not the rights of a returned veteran were so permanent that they could not be changed by the bargaining agent. Be that as it may, it did determine what were the seniority rights of the positions held by Highland employees, one of which the respondent held at the time of his induction into the armed forces and to which he had

been restored on his return. It is to the seniority of that position that this court has decided in the *Fishgold* case the respondent was entitled. His seniority rights in that position to which he had been restored were no different than the seniority rights of all other Highland employees. The Hess suit definitely determined that the seniority rights of the positions held by Highland employees at the time of the merger were such as permitted and made lawful the contract of 1944, made as a result of bargaining between the Company and the certified bargaining agent.

CONCLUSION

We, therefore, respectfully submit that the Government's brief has erroneously construed the Act by reading into the Act words and meanings which are not therein contained, and that the Circuit Court of Appeals below erred and that it should be reversed.

Respectfully submitted,

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No. 1099 85

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.-C. I. O. LOCAL NO. 392, PETITIONERS

v.

LAWRENCE WHIRLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1099

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.-C. I. O. LOCAL NO. 392, PETITIONERS

v.

LAWRENCE WHIRLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Respondent Lawrence Whirls entered the employment of the Highland Body Manufacturing Company in 1935. He entered the military service of the United States in 1942, was honorably discharged therefrom and in May 1943 returned to his position, as an employee of Highland Body Manufacturing Company (R. 64). The Highland Body Manufacturing Company and petitioner, The Trailmobile Company, were two corporations manufacturing the same commodities in two sepa-

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rate plants in Cincinnati, Ohio (R. 63). The Highland Company was a wholly-owned subsidiary of The Trailmobile Company. During 1943 a plan of consolidation of the two companies was executed whereby The Trailmobile Company took over the assets and business of the Highland Company and agreed to assume, pay and carry out all obligations of the latter (R. 63). The transaction was effective on January 1, 1944, and the employees of the Highland Company were transferred to the payroll of The Trailmobile Company (R. 63). On the last full year of independent operation, 1942, the Highland Company had roughly 100 employees and The Trailmobile Company had approximately 1,000 employees (R. 63). The employees of both companies prior to the consolidation were affiliated with the American Federation of Labor (R. 64). Following the consolidation, a controversy as to the respective seniority rights of both groups of employees was submitted to the national representatives of the American Federation of Labor and that body decided that all employees of both companies under the consolidation "should rate seniority" as of the date they had been employed by their respective companies (R. 64). The employees of The Trailmobile Company then reorganized as a unit of the C. I. O. and in an election, the C. I. O. local was selected as the bargaining representative (R. 3). It negotiated a contract with The Trailmobile Company

about July 1, 1944 (R. 64), which fixed the seniority rights of the Highland Company's employees, regardless of their date of employment, as of January 1, 1944 (R. 64). The agreement further provided that within one year all employees must become affiliated with the C. I. O. Union, thus effecting a closed shop (R. 64).

A class suit in the state court of Ohio was brought by one Hess, a former employee of the Highland Company, seeking to enjoin the C. I. O. Union and The Trailmobile Company from carrying out the seniority provisions of the new agreement (R. 64). The basis of his claim was that under the National Labor Relations Act, an employment agreement whereby the employers have bartered away the established rights of the minority of employees for the benefit of the majority is invalid (R. 64). Both the Court of Common Pleas and the Court of Appeals of Ohio decided the Hess case adversely to the contention of the former Highland employees (R. 52–55). The Supreme Court of Ohio refused to review the case (R. 64).

Complying with the closed shop provisions of the Union contract, Whirls joined the United Automobile Workers-C. I. O. in June of 1945 (R. 64). His reduction in seniority occurred 14 months after he returned to his former position (R. 64). Represented by the United States Attorney, pursuant to Section 8 (e) of the Selective

Training and Service Act of 1940, as amended, respondent brought suit in the United States District Court for the Southern District of Ohio against The Trailmobile Company, alleging violation of his seniority status conferred upon him by the Selective Training and Service Act (R. 55–58). He prayed for a mandatory injunction restoring him to the seniority as of the date of his original employment, February 8, 1935 (R. 58). Petitioner U. A. W.-C. I. O. Local 392 was permitted to intervene and it filed an answer praying that the complaint be dismissed (R. 59). Findings of fact and conclusions of law were made by the District Judge (R. 63–66). He entered a judgment on December 20, 1945, directing that The Trailmobile Company reinstate the seniority of respondent as of February 8, 1935, and cancel the present seniority status of January 1, 1944 (R. 67). Both petitioners appealed (R. 67, 68). On appeal the Circuit Court of Appeals for the Sixth Circuit affirmed, holding that the provisions of Section 8 (b) and (c) of the Selective Training and Service Act of 1940, which required that a veteran be restored to his former job without loss of seniority, precluded a collective bargaining agreement from whittling down the veteran's seniority, notwithstanding the fact that more than a year had passed after his return to the job (R. 75–76). It further held that the right of the respondent to his seniority continued to be protected

by the Selective Training and Service Act, notwithstanding the consolidation of the Highland and Trailmobile Companies, because The Trailmobile Company assumed all obligations of the Highland Company and one of these obligations was to continue the seniority status of Whirls (R. 78-79). Finally it rejected the contention that the class suit brought by Hess in the state courts of Ohio was *res judicata*. In that aspect of the case, it held that Hess was not in a position to bring a representative suit which would bind respondent Whirls insofar as the seniority conferred upon him by the Selective Training and Service Act was concerned.

Petitioners, in the petition filed herein, have abandoned the second and third ground urged before the court below and present one question only, namely, whether Section 8 (b) and (c) of the Selective Training and Service Act of 1940, as amended, gives to a war veteran, who was restored to the position of employment occupied by him prior to his military service and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service following that one year reemployment period notwithstanding the fact that a union, which he was compelled to join in order to retain employment, had changed the seniority provisions of his employment contract to his detriment (Pet. 2).

The decision of the court below is correct. Section 8 (b) of the Act provides that an honorably discharged serviceman who had left a permanent position with a private employer shall be restored to such position "or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Section 8 (c) further provides that the veteran "shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority," and in addition to certain other benefits, "shall not be discharged from such position within one year after such restoration." As this Court has held, the veteran

> does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, this Term, decided May 27, 1946, pp. 6–7, slip sheet opinion.

The restoration of full seniority is clearly a benefit separate and distinct from the other benefits conferred by Sections 8 (b) and (c) and is not, therefore, controlled by the one-year guaran-

tee against discharge. From this the court below correctly reasoned that the statutory benefit conferred upon a veteran takes precedence over the general right conferred by the Wagner Act upon elected representatives to enter into collective bargaining agreements binding upon all employees; and that it does not lie within the power of the employer to join with a collective bargaining agency to bargain away the seniority status of a veteran protected by the statute. Cf. *Fishgold* v. *Sullivan Dry Dock & Repair Corp., supra.*

Contrary to petitioner's contention, the question does not appear to be of general public importance. We are unaware of any other instances whereby an employer and a union have undertaken, through a collective bargaining agreement, to destroy the seniority status of a veteran otherwise protected by the Federal Act. Moreover, the peculiar facts of this case do not suggest its frequent recurrence. There had been a merger, giving rise to sharply conflicting seniority claims (R. 3). The majority compelled a change of bargaining representation to impose its views as to seniority upon the minority. To the extent that this change was designed to discriminate against employees not previously belonging to the union, it would appear to be unlawful under *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248. A closed shop resulted which compelled respondent to join petitioner union if he

wished to continue to work. The situation is entirely different from one where a veteran voluntarily constitutes a particular union as his bargaining agent and a labor contract is subsequently entered into which changes his relative seniority.

There is one additional consideration which we believe should be called to this Court's attention. We are advised that under the date of April 10, 1946, respondent was advised by the Union that he was charged with conduct unbecoming a member. The grounds upon which the charge was based were (1) instituting action in a civil court without exhausting the remedies provided by the Union; (2) violating the provisions of the contract negotiated between the Union and the employer; (3) negotiating through others than the Union; and (4) conducting himself in a way harmful to the interests of the Union and its members. On April 15, the Local Union requested that The Trailmobile Company immediately suspend Whirls from work. The Company notified Whirls not to report for work and advised him he would be paid for the rest of that week. We are advised that the company has continued to keep Whirls on the payroll. We do not believe that these circumstances make the case moot. Respondent obtained a judgment below which gave him certain rights against the Company and conceivably against the Union which intervened as a defendant and so became bound by the judgment.

Cf. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, this Term, decided May 27, 1946. Presumably, he has rights under the decision below which he can continue to assert.

Even though we appear as statutory counsel for the respondent, we would be reluctant to oppose the petition for certiorari simply to enable him to retain the advantage gained in the courts below, however correct we consider those decisions to be. But since there is no present likelihood of frequent recurrence of the specific question here presented, we feel that no large public interest would be served by further review. There will be ample opportunity for further consideration of the problem in the event that the issue should become one of general importance at a later date.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.–C. I. O., LOCAL NO. 392, PETITIONERS

v.

LAWRENCE WHIRLS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 85

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA U. A. W.-C. I. O., LOCAL NO. 392, PETITIONERS

v.

LAWRENCE WHIRLS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Ohio (R. 63–66) is reported at 64 F. Supp. 713. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 70–81) is reported at 154 F. 2d 866.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 5, 1946 (R. 70). The

petition for a writ of certiorari was filed on April 11, 1946, and was granted on June 10, 1946 (R. 81). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employer who has restored a World War II veteran to the position occupied by him prior to his military service, and has not changed the incidents of his employment for one year, may thereafter deprive the veteran of his seniority rights and status, by collective bargaining agreement or otherwise.

STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 301 *et seq.*, are set forth in the Appendix, *infra*, pp. 69–74.

STATEMENT

Respondent Lawrence Whirls entered the employment of the Highland Body Manufacturing Company in 1935 (R. 64). He entered the military service of the United States in 1942 (R. 64), and in May 1943 was honorably discharged therefrom and returned to his position as an employee of Highland (R. 64), without loss of seniority, and at the same pay and status (R. 4,

64). Highland and petitioner, The Trailmobile Company[1] were two related corporations manufacturing the same commodities in two separate plants in different parts of Cincinnati, Ohio (R. 63); Highland was a wholly-owned subsidiary of Trailmobile and had the same executive officers (R. 63).

After July 1940 the operations of the two companies were integrated. See *The Trailer Company of America*, 51 N. L. R. B. 1106, 1107, 1113. During the year 1943 a plan of consolidation of the two companies was executed whereby Trailmobile was to take over the assets and business of Highland and to assume, pay and carry out all of the latter's obligations (R. 2, 17–19, 63). Pursuant to this plan, Highland's supplies, equipment, and personnel were gradually transferred to Trailmobile's plant in the last months of 1943 (R. 2, 63), and the plan became fully effective on January 1, 1944 (R. 17–21), at which time Highland's employees, including respondent, were transferred to the Trailmobile payroll

[1] The Trailmobile Company was formerly called The Trailer Company of America (R. 61, 72), and some of the documents submitted to the District Court refer to the latter name. The record does not affirmatively show that the difference is one of name only, but all parties and the two lower courts have treated The Trailer Company of America and petitioner The Trailmobile Company as one and the same (R. 72). Trailmobile's brief in this Court (p. 4) states that the change in name occurred in 1944.

(R. 63). In its last full year of independent operation, 1942, Highland had roughly 100 employees and produced commodities worth one and one-half million dollars, and Trailmobile had 1,000 employees and its production was valued at twelve million dollars (R. 63).

For some years prior to the corporate consolidation, the employees of both companies were affiliated with the American Federation of Labor (R. 64), and a series of single collective bargaining agreements had been entered into with respect to the employees of both plants, including Whirls (R. 21–23, 39–40); see *The Trailer Company of America*, 51 N. L. R. B. 1106. After the operations of the two companies had been merged, a controversy arose between the two groups of employees as to their respective seniority rights. The former Highland employees insisted on continuing to compute their length of seniority from the date they began work for Highland, while the old Trailmobile workers wanted them to be treated as new employees of Trailmobile, with seniority counting only from January 1, 1944, the date of the consolidation. (R. 3, 64.) The controversy was submitted to the proper national representatives of the American Federation of Labor who decided that all employees of both companies should rate seniority under the consolidation as of the date they had been employed by their respective companies (R. 3, 6–7, 64).

The old Trailmobile employees thereupon reorganized as a unit of the Congress of Industrial Organizations, and in an election sponsored by the National Labor Relations Board, the new C. I. O. local, petitioner herein, was selected as the bargaining representative for most of Trailmobile's production and maintenance employees (R. 3, 6, 64; see *The Trailer Company of America*, 51 N. L. R. B. 1106, and 53 N. L. R. B. 1248).[2]

The company thereupon began collective bargaining with petitioner union (hereinafter called Local 392), and in July 1944, a contract was negotiated to take effect as of June 21, 1944,[3] which fixed the seniority rights of the former Highland employees, regardless of the time of their initial employment by Highland, as of January 1, 1944, the effective date of the merger (R. 3, 40–41, 64). The agreement further provided that within one year all of Trailmobile's employees were to join

[2] The Labor Board ruled that all the production and maintenance employees of Trailmobile (including Highland employees), with the exception of certain employees of the cab and woodworking departments, constituted a single appropriate bargaining unit. See 51 N. L. R. B. at 1113–1115; see also R. 3, 6, 23, 40–41. This ruling was made after the operating merger but before the corporate merger.

[3] The contract is referred to throughout the present record as that of June 21, 1944. R. 30, 41, 51; see also *Hess* v. *Trailer Co.*, 31 O. O. 566, 567. But there are indications that it was not actually signed until July 15, 1944. See Trailmobile Br. 5, n. 3; Local 392 Br. 2; cf. R. 57, par. VII.

petitioner union, thus effecting a closed shop (R. 64).[4]

Shortly after the negotiation of this contract, a class suit in an Ohio state court was brought by one Hess, a former Highland employee, on behalf of himself and other former Highland employees, including the respondent, seeking to enjoin both petitioners herein from carrying out the seniority provisions of the new agreement, insofar as it required the counting of the seniority of former Highland employees only from January 1, 1944 (R. 3, 28–35, 64). The basis of the claim was that under the National Labor Relations Act a collective bargaining agreement whereby the employees' agent bartered away the established rights of a minority of the employees for the benefit of the majority was invalid (R. 3, 64). Both the Court of Common Pleas for Hamilton County (R. 52–53; *Hess* v. *Trailer Co.*, 31 O. O. 566, decided December 19, 1944) and the Court of Appeals (R. 54–55) decided the case adversely to

[4] The District Court found that the collective bargaining agreement of July 1944 provided that within one year all the employees were to join petitioner union (R. 64). However, in its brief in this Court, Trailmobile indicates that the contract of July 1944 provided that the former Highland employees did not have to join petitioner union as a condition of employment (although all other employees had to do so), but that the next annual contract (signed in July 1945) did provide that all employees (including former Highland workers) had to join the C. I. O. union as a condition of employment (p. 5). The present record does not indicate which version is correct.

the former Highland employees, on the ground that it was not illegal for petitioners to treat the two companies as separate legal entities and, on the dissolution of Highland, its former employees as new employees of Trailmobile.[5] The Supreme Court of Ohio refused to review the case, sometime in the fall of 1945 (R. 16, 55). Respondent Whirls was not actually a party to this action, though he was working for Trailmobile at the time, and was doubtless aware of the institution of the suit (R. 6).

Complying with the closed shop provision of Trailmobile's contract with the union, Whirls joined the petitioner union in June 1945 (R. 65).[6] Aside from the official change in respondent's seniority status occasioned by the terms of the June 1944 contract, the company apparently took no action actually changing his position or pay until early in September 1945 when he was transferred from the Painting Department, where he had been drawing pay of $1.05 per hour, to the Stock Department, with a threatened reduction

[5] Neither the opinion of the Court of Common Pleas, its judgment entry (R. 52–53), nor the Court of Appeals' Decree and Entry of Affirmance (R. 54–55) purports to pass, in any way, upon a returned veteran's rights under the Selective Training and Service Act, and petitioners have not claimed that this point was presented to the state courts.

[6] See footnote 4, *supra*, p. 6. Trailmobile's brief in this Court states that respondent joined the union after the signing of the July 1945 contract requiring former Highland employees to join the union as a condition of employment (p. 5).

in pay to $.83 per hour, as well as a reduction in effective seniority (R. 57–58). Represented by the United States Attorney, pursuant to Section 8 (e) of the Selective Training and Service Act, respondent brought suit, on September 18, 1945, in the District Court against Trailmobile, alleging violation of the seniority status conferred upon him by the Selective Training and Service Act (R. 55–58). He prayed for an injunction against any reduction in pay below $1.05 per hour and against a change in his seniority status "to the control date of January 1, 1944," and for a mandatory injunction restoring him to his position in the Painting Department and to his seniority dating from his original employment on February 8, 1935 (R. 58). Local 392 was permitted to intervene; it filed an answer praying that the complaint be dismissed (R. 59). Trailmobile also answered, denying that respondent had a valid claim and praying for dismissal of his complaint (R. 60–63). It was urged that the state court litigation initiated by Hess raised the bar of *res judicata* against respondent, that respondent's seniority rights were protected by the federal statute for only one year, that Trailmobile had no statutory duties towards a Highland veteran-employee, and that by joining Local 392 respondent bound himself to abide by the agreements negotiated by the union.

The District Court tried the cause on the pleadings, oral stipulations of counsel, and documentary

exhibits (R. 74). The facts were almost wholly undisputed. It was brought out that, since the institution of the action, Whirls had been again transferred and was being paid $1.18 per hour (R. 8), and accordingly the parties agreed that the District Court's decision should be limited to the issue of seniority (R. 9). The District Court made findings of fact and concluded that respondent's cause of action was proved and petitioners' defenses invalid (R. 63–66). Judgment was entered December 20, 1945, directing Trailmobile to reinstate respondent's seniority as of February 8, 1935, and to cancel his present seniority status as of January 1, 1944 (R. 67). Both petitioners appealed (R. 67, 68).

The Circuit Court of Appeals for the Sixth Circuit affirmed, holding that the provisions of Section 8 (b) and (c) of the Selective Training and Service Act of 1940, which required that a veteran be restored to his former job without loss of seniority, precluded a collective bargaining agreement from whittling down the veteran's seniority, notwithstanding the fact that more than a year had passed after his return to the job (R. 75–76). It further held that the right of the respondent to his seniority continued to be protected by the Selective Training and Service Act, notwithstanding the consolidation of Highland and Trailmobile, because the latter assumed all the obligations of the former, and one of these obligations was to

continue the seniority status of Whirls (R. 78–79). Finally, the court rejected the contention that the class suit brought by Hess in the state courts of Ohio was *res judicata*. In that aspect of the case, it held that Hess was not in a position to bring a representative suit which would bind Whirls insofar as his reemployment and seniority rights under the Selective Training and Service Act were concerned (R. 79–80). Judgment of affirmance was entered on April 5, 1946 (R. 70).

Petitioners, in their petition for certiorari filed herein, have abandoned all the grounds urged before the lower courts, except the construction of Section 8 of the Selective Training and Service Act, as amended. In their petition and in their briefs on the merits, petitioners present only a single question, namely, whether Section 8 (b) and (c) of the Act gives to a war veteran, who was restored to the position of employment occupied by him prior to his military service and who was continuously so employed for more than one year, the right thereafter to retain the seniority status held by him when he entered the service, notwithstanding the fact that the plant union, which respondent was compelled to join in order to retain employment, had changed, by collective bargaining agreement, the seniority provisions of his employment contract to his detriment (Pet. 2). The case must thus be treated as if there were only one

company involved, and respondent had been employed by it since 1935.[7]

As we indicated in our Memorandum when the case was pending on petition for a writ of certiorari (p. 8), there is one set of additional circumstances, occurring since the filing of the petition in this Court, which we believe should be called to the Court's attention. We are advised that in a letter dated April 10, 1946, respondent was informed by Local 392 that he was charged with conduct unbecoming a union member, specifically with (1) instituting action in a civil court without exhausting the remedies provided by the union; (2)

[7] The petition for certiorari did not present as questions involved either the plea of *res judicata* or the circumstance that the two merged companies were originally separate entities; and the rulings of the court below on these points were not specified as error. Although Local 392's brief on the merits retains the "Questions Presented" and "Specification of Errors to be Urged" as those were each presented in the petition, Local 392 none the less attempts to argue these matters. We submit that this attempt is foreclosed both by the rules of this Court (Rule 38 (2); Rule 27 (6)) and by its consistent practice. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Webster Electric Co.* v. *Splitdorf Electrical Co.*, 264 U. S. 463, 464; *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, 496–497; *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357; *Flournoy* v. *Wiener*, 321 U. S. 253, 259. Consequently, we do not argue these points.

Trailmobile agrees that the issue of *res judicata* is not presented here (Br. 17), and properly treats the case as though respondent had always been employed by one company.

violating the provisions of the contract negotiated between the union and the employers; (3) negotiating for himself through others than the union; and (4) in various manners acting and conducting himself in a way which is contrary and harmful to the interests of the union and its members. By letter dated April 15, 1946, Local 392 requested Trailmobile immediately to suspend respondent from work, as he was no longer a member of Local 392 pending his trial as to the charges preferred against him by members of the union. We understand that the company notified Whirls not to report for work and advised him that he would be paid for the rest of that week. We also understand, and Trailmobile admits (Br. 20), that the company has continued to keep Whirls on the payroll, on leave of absence with full pay. Trailmobile asserts that this condition will continue until the final determination of this case (Br. 20).

We do not believe that these circumstances make the case moot. Respondent appears to be still an employee of Trailmobile. He obtained a judgment below which gave him certain rights against that petitioner and conceivably against the union which intervened as a defendant and so became bound by the judgment. Being still an employee, respondent has rights under the decision below which he can presumably continue to assert.

SUMMARY OF ARGUMENT

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 900, Oct. T. 1945, decided May 27, 1946, the Court held that each portion of the reemployment section of the Selective Training and Service Act must be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." In that case, the Court held that the veteran's claim, based on the last clause of Section 8 (c), to a year's actual employment, even though his normal pre-service seniority did not entitle him to such steady work, could not be reconciled with the structure and terms of the Act. In the present case, the question concerns the protection accorded by the Act, after the initial year of reemployment, to the veteran's normal pre-service seniority. The court below correctly held that the Act could only be harmoniously and liberally construed by reading it to guarantee the veteran's pre-service seniority rights beyond the first year of reemployment.

I. A. The Act confers positive benefits; contrary to petitioners' contention, it is more than a measure designed only to prevent discrimination against the returning veteran because of his military service. In many clauses, as this Court recognized in the *Fishgold* case, the statute clearly gives the reemployed veteran protection

which he would not have had if he had remained at work. It is therefore no answer in the present case to urge that respondent is in no worse position than he would have occupied if he had never gone to war. It is clear from the detailed specification of positive rights in the statute that reintegration of the veteran with his fellow employees without discrimination was not the only purpose of Congress.

B. Congress provided for reinstatement in a continuing employment, not simply for a momentary restoration. The terms used in Section 8—"restore", "position", "in the employ of a private employer", "status", "seniority"—connote a continuing employment, and indicate that legislative concern extended beyond the veteran's initial day or week or year of reemployment.

C. The right to pre-service seniority was intended to last as long as the veteran remains in the company's employ; the only alternative is the untenable one that the right to restoration is subject, from the beginning, to the employer's whim. The one-year limitation, in Section 8 (c), in terms governs only "discharge" and cannot protect against detrimental changes in the veteran's employment during the first year which fall short of loss of position. Moreover, restriction of the veteran's protection to one year would nullify the avowed Congressional interest in seniority, insurance, and retirement benefits

and rights, all of which gain increasingly in significance with the passage of time; it would also permit unlimited discrimination against the veteran because of his military service. Congress cannot have so intended.

Nor is there substance to petitioners' argument that seniority rights cannot outlast the first year of employment because after that year the employer can discharge the veteran. The Act does not authorize the employer to discharge the veteran in order to evade the obligation to accord him his other rights. It is clear that Congress did not confer upon employers a power of discharge so unrestricted that it could destroy seniority rights of many years' standing.

D. This construction of the Act, under which the right to complete reinstatement without loss of seniority imposes a continuing obligation on the employer, does not freeze the veteran's job as to all incidents of employment; but it is unlikely that either technological advances or altered economic conditions will require changes in the case of seniority rights. Nor will such a construction involve burdensome litigation. In any event, Congress has squarely entrusted the courts with the protection of veterans' rights; it rejected a proposal for administrative handling of these problems.

E. Nothing in the National Labor Relations Act authorizes collective bargaining agreements

which purport to restrict the benefits conferred on veterans by the Selective Training and Service Act, any more than the National Labor Relations Act authorizes violations of other federal statutes dealing with specific industrial problems. Collective bargaining can no more whittle down a veteran's rights than can an employer's self-imposed personnel practices. And a veteran who joined a union solely to prevent dismissal under the terms of a closed-shop contract cannot be held to have voluntarily consented to the union agreement under which his own seniority rights were reduced.

II. The legislative history of Section 8 shows that Congress intended the veteran's restored seniority status to continue beyond the first year of reemployment. Throughout the Congressional consideration of the reemployment provisions, in committee and on the floor, the independence, substantiality, and stability of the right to restoration without loss of seniority was consistently asserted. The limitation of that right to the first year was never suggested; it was at all times treated as distinct and separate from the "one year" clause of Section 8 (c). And it is significant that in 1946, when the Selective Training and Service Act was last extended, the rights under Section 8 were made perpetual; if the right to restored pre-service seniority had been intended to continue only for the first year of

reemployment, a very much shorter extension would have sufficed.

III. There are no reasons, special to this case, why respondent should not be restored to his pre-service seniority. No claim is made that it would be either unreasonable or impossible to do so. Nor can the intense opposition of other employees be used to deprive him of his statutory rights, any more than strong and even inflamed public sentiment can deprive an individual of the right of free speech or the right to a fair trial. No improper or illegal discrimination against these other employees would result.

Respondent's enforced joining of petitioner union, in June 1945, in order to save his livelihood, cannot be deemed consent to the change in his seniority status; and the union's attempt to take disciplinary action against him because of his success in asserting his rights in the court below is, in the circumstances, of doubtful validity and of even more doubtful good faith.

ARGUMENT

At its last Term, the Court held, in *Fishgold v. Sullivan Drydock & Repair Corporation*, No. 970, Oct. T. 1945, decided May 27, 1946, that the Selective Training and Service Act does not guarantee a veteran the right to a year's actual employment (if the work he previously performed is still available), where his normal pre-service

seniority would not otherwise entitle him to such steady employment. The instant case involves the different issue of the protection accorded by the Act, after the lapse of the initial year of reemployment, to the veteran's normal pre-service seniority rights. Petitioners assert that the expiration of the first year marks the end of Congressional concern, in the Selective Training and Service Act, with all phases of the veteran's reemployment and rehabilitation in his job. Our position, on the other hand, is that Section 8 of the Act continues to give legislative sanction and protection to the veteran's restored seniority rights beyond the first year.

Section 8, as construed in the *Fishgold* case, provides that, unless the employer's circumstances have radically changed, a veteran must be "restored" to the "position * * * in the employ of a private employer" which he left to enter the service, or "to a position of like seniority, status, and pay"; that the restored position must be at least equal in pay, seniority and status to the pre-service job, and must also reflect seniority accumulated during the war but no step-up in priority; that insurance and other benefits must continue to be open to the reemployed veteran according "to established rules and practices relating to employees on furlough or leave of absence in effect with the employer" at the time the employee entered service; and, finally, that the

veteran cannot be discharged or demoted without cause for a year after his restoration, though he may be laid off during that year in accordance with the established pre-service seniority system.

The spirit in which these reemployment provisions of the Selective Training and Service Act are to be interpreted was announced in the *Fishgold* case (p. 7 of slip opinion):

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner*, 319 U. S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

In accordance with these criteria, we propose to show that, in the light of its liberal purpose to aid the veteran, the Act can be harmoniously construed only by striking down the action which the employer and the union have here jointly taken to reduce drastically respondent's pre-service seniority. The crucial right here is that of restoration to a position with at least the same seniority as the pre-service job. That right, and the correlative obligation of the employer to

restore the veteran to such a position, are continuing ones, which the statute, properly and fairly construed, extends beyond the first year of reemployment.

I. SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT PROTECTS THE RESTORED VETERAN'S SENIORITY STATUS BEYOND THE FIRST YEAR OF REEMPLOYMENT

A. THE ACT CONFERS POSITIVE BENEFITS; IT IS MORE THAN A MEASURE DESIGNED ONLY TO PREVENT DISCRIMINATION AGAINST THE RETURNING VETERAN BECAUSE OF HIS MILITARY SERVICE

It will help at the outset in the clarification of the issues here involved to discuss an invalid proposition which threads petitioners' argument and which, if accepted, would dispose of the case in their favor. They urge that Section 8 has no other aim but to prevent discrimination against the veteran on account of his military service, and that therefore any change in employment conditions is permissible (apparently even at the time of initial restoration or during the first year) which would have occurred had the veteran remained at the plant.[8] The short answer to this proposal is that the Act shows on its face that it is not solely one to prevent discrimination against veterans on their return. As the Court said in *Fishgold's* case (p. 6 of slip opinion), "The Act

[8] Respondent does not claim that he was discriminated against because of his military service. Other former Highland employees, non-veterans, were treated in the same way.

was designed to protect the veteran *in several ways*. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind"*. [Italics added.][9]

In many of its clauses the statute clearly gives the reemployed veteran protection which he would not have had if he had remained at work. (1) The veteran is normally guaranteed, for instance, against receiving a job inferior to that which he had before entering the armed services, although had he stayed at the plant he might have been reduced in pay or status, and non-veteran colleagues may actually have suffered such reduction while he was away in service. (2) The veteran steps back on the seniority escalator at the point he would have occupied had he kept his position steadily during the war with uniformly accumulating seniority, even though [illegible] changes might have altered the accrual rate of his seniority rights. (3) He participates in insurance and other benefits "pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer *at the time such person was inducted into such forces*" (Section 8 (c)), although the rules might have been effectively changed during the

[9] All italics in this brief are added unless otherwise indicated.

war for employees then at work. (4) Finally, the veteran alone is guaranteed against dismissal or demotion without cause for one year.

It is no answer to the problem of the present case, therefore, to urge that Whirls is in no worse position than he would have occupied if he had never gone to war. He did go, and so he is in a different position; he has the right to benefits not conferred on those who did not assume the burden of their country's defense.

It is true, of course, that each of the specific benefits just enumerated was evidently designed, in part, to bar discrimination against the veteran as such; but it is also plain that Congress also had the different and more affirmative aim of enabling the discharged soldier to begin his commercial or industrial rehabilitation in at least as good a position as he had when he left to enter the armed forces.[10] Protection against discrimination, though important, was not enough. The veteran was to have the fixed and accustomed starting point of his old job from which to begin his economic readjustment in civilian life. Section 8 would not have been drafted as it is, with detailed specification of these positive rights, if

[10] In the debate on the Selective Training and Service Act, Representative Healey stated that "You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their status quo before they were inducted into the service." 86 Cong. Rec. 11703. Uniform Congressional comment was to the same effect. See *infra*, pp. 56–58.

the legislative intention had been merely to ensure that the veteran would not be penalized by employer or union on account of his military service. It would and could have been cast in the familiar terms of a general prohibition against such discrimination. We point out below, pp. 47, 53, that Congress rejected a proposal which would have made failure to reemploy a veteran an unfair labor practice. Consequently, to read the statute as petitioners urge, as embodying only a rule against discrimination, is to find in it provisions which Congress advisedly refused to write, while at the same time remaining oblivious to the statute's actual intention, structure, and terms.

Contrary to petitioners' assumptions, the *Fishgold* case did not imply otherwise. The Court there recognized that the affirmative requirement of restoration to the veteran's old job embodied the dual purpose of the Act to bar discrimination against him and, at the same time, to give him a definite measure of economic security. Petitioners isolate one or two sentences in the opinion from their context,[11] and conclude from them that the Court has already determined that Section 8

[11] "But we would distort the language of these [seniority] provisions if we read it as granting the veteran an increase in seniority *over what he would have had if he had never entered the armed services.*" "It [Congress] sought to preserve the veteran's rights under those [seniority] systems and to protect him against loss under them *by reason of his absence.*" (Slip opinion, pp. 7, 9.)

is nothing more than an injunction to employers not to penalize veterans because of their military careers. But the Court was obviously concerned with the case then before it—a demand for a status superior to pre-service seniority—and not with the instant problem of preservation of pre-service seniority, nor with that which would arise if an unanticipated but non-discriminatory reduction in seniority had occurred while the veteran was away. This is made clear by the body of the opinion and the reiterated emphasis on restoration to the old job plus cumulated seniority. Particularly apt is the sentence immediately succeeding that first quoted in footnote 11, in which the Court agreed that "by these [seniority] provisions Congress made the restoration as nearly a complete substitute for the original job as was possible." Conversely, the Court did not agree that the only purpose of Congress was to reintegrate the veteran with his fellow employees without discrimination.

B. CONGRESS PROVIDED FOR REINSTATEMENT IN A CONTINUING EMPLOYMENT, NOT SIMPLY FOR MOMENTARY RESTORATION

With petitioners' inaccurate conception of Section 8's motivating aim put aside, it is not difficult to draw from the words of the statute the type and duration of the mutual rights and obligations Congress meant to establish.

The clauses here pertinent provide (Section 8 (b)) that on the return of the inducted person

with a certificate of service, who is still qualified to perform the duties of the position and who makes application for reemployment within the time required by law,

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position

without cause within one year after such restoration.

Restoration to a *position in the employ* of the employer necessarily implies a continuing relationship between employer and employee, and cannot be merely a single one-time obligation which is entirely fulfilled when the employer places the veteran's name on his rolls, or the first time the veteran comes to work. Each of the critical words employed by Congress—"restore", "position", "in the employ of a private employer", "status", "seniority"—connotes a continuing employment of indefinite duration. To "restore", according to the Oxford English Dictionary, is "to reinstate or replace (a person) in a former office, dignity, or estate", or "to bring back (a person or thing) *to* a previous, original, or normal condition."[12] A "position" is, in general, an "official situation, place, or employment", and, as the *Fishgold* case expressly recognizes, in the industrial field a "position in the employ of a private employer" involves a continuing employer-employee relationship—surviving lay-offs, furloughs, and leaves of absence—

[12] Other pertinent definitions of the term, in the Oxford English Dictionary, are: "To bring back to the original state; to improve, repair, or retouch (a thing), so as to bring it back to its original condition"; "To renew; to set up or bring into existence again; to re-establish, bring back into use, etc."; "To grant to or obtain for (a person) reinstatement *to* former rank, office, or possessions." [Italics in original.]

to which is attached a group of mutual rights and obligations varying with the terms of the employment. Similarly, the very heart of "status" is continuity of a definitive condition; and "seniority" rights are most frequently of significance only at discontinuous times in the course of a continuing employment, such as periods of slackened work, rearrangement of shifts, or the occurrence of vacancies in more desirable positions. The same is true of insurance, sick, and retirement benefits which Section 8 (c) specifically preserves for the reemployed veteran.

These terms and provisions of Section 8 strongly imply that Congress intended to provide for the reinstatement of the veteran in a continuing employment and did not limit its concern to the initial replacing of the veteran on his former employer's rolls, leaving him thereafter to protect his job, and its incidents, by his own or his union's force. And these words of Section 8 accurately reflect the legislative interest in the veteran's continuing employment, as shown by the uniform Congressional pronouncements made in the course of the adoption of the Section. See *infra*, pp. 54–58.

C. THE RIGHT TO PRE-SERVICE SENIORITY IS NOT LIMITED TO SIMPLY THE FIRST YEAR OF REEMPLOYMENT

It is a corollary of the *employer's continuing obligation to restore the veteran to his old position* (or a like one), that he is normally bound, so long

as the Act remains in effect,[13] and the veteran is in his employ, not to effect any unconsented detrimental change in the incidents of his reinstated employee's position, as they were at the time of reemployment. In the absence of changed circumstances or the veteran's consent, his pay cannot be lowered, his seniority decreased, his benefits cut off, or his status diminished.[14] Otherwise, the right to *restoration* is deprived of its full meaning and the veteran's right to be "protected against receiving a job inferior to that which he had before entering the armed services" (*Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* slip opinion, p. 6) becomes an entirely insubstantial privilege. But Congress, intent upon rehabilitating the veteran in his old job, was certainly not ready to allow the employer drastically to reduce at will the veteran's pay or seniority or status of benefits, perhaps within a day or a week after he had returned to work. The veteran's rights to restoration without loss of seniority was intended to

[13] Public Law 473, 79th Cong., 2nd sess., approved June 29, 1946, amended Section 16 (b) of the Selective Training and Service Act, as previously amended, to provide that all of Section 8 should have indefinite existence, and thus survive the terminal date of the other portions of the Act. Previously, only Paragraph (g) of Section 8, pertaining to the Personnel Division of the Selective Service System, was excluded from lapse at the termination of the Act. See *infra*, pp. 59–60, 72–73.

[14] See *infra*, pp. 36, 44–45, as to the possibility of distinguishing the duration of rights to seniority and insurance benefits from those to restored pay.

be more secure than a shadow right.[15] And since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ. The only alternative is the untenable one that the right to restoration is without substance and the veteran subject, from the beginning, to the employer's unfettered will.

Trailmobile recognizes the futility of urging that the veteran's position is totally at the mercy of the employer from the day of reinstatement. It admits that the statutory protection must have some duration; but it insists that the guarantee lasts for only one year since it finds effective sanction solely in the "one year" clause of Section 8 (*c*). Petitioner flatly asserts that "paragraph B [of Section 8 (b)][16] does not guarantee any length of time for seniority, status, or pay," and "in other words, under the terms of this particular paragraph, after the employee has been restored to *such position* or to a *position of like seniority, status, and pay*, there is no statutory prohibition against the employer doing with such

[15] Senator Thomas described Section 8 as an attempt to "make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." 86 Cong. Rec. 10572. See *infra*, pp. 56–58.

[16] "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

employee as circumstances then might require. His status could be changed, his pay could be changed, and so could his seniority without any violation of this paragraph (b) (B). Without resorting to the last provision of (c),[17] there would be no guarantee of *seniority* nor *status* nor *pay* for any length of time * * *." (Br. 10–11; italics in original.) This attempt first to destroy Section 8 (b) (B), and then to resurrect it by way of an unrelated portion of Section 8 (c), is the only way petitioner can escape its dilemma of either leaving the veteran wholly unprotected against unfavorable changes even during his first year, or of admitting that the right to pre-service seniority continues indefinitely. Petitioner cannot succeed, however. Paragraph (b) has a greater function, and paragraph (c) a lesser one, than petitioner ascribes. In Point II, *infra*, pp. 50–60, we shall show that Congress, in the course of enacting the statute, treated the right to resto-

[17] "(c) Any person who is restored to a position in accordance with the provision of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

ration without loss of seniority as entirely distinct from the "one year" clause and as independently substantial. Here, we point out that, on analysis of the terms and content of Section 8, the dilemma can only be resolved by recognizing that the right to restored seniority continues indefinitely.

1. Grammatically, there can be no doubt but that "within one year" applies only to the last clause of paragraph (c), and does not relate to the other rights granted by paragraph (b) and (c). Each of the clauses of paragraph (c) is set off by commas, and the limiting phrase appears only in the last clause. In its recent enumeration of veterans' reemployment rights in the *Fishgold* case, the Court referred to the one year provision only in connection with the guarantee against discharge without cause, and all parties in that case (including the Congress of Industrial Organizations and the United Automobile, Aircraft, Agricultural Implement Workers of America, parent bodies of the union petitioner herein, appearing as *amici curiae*) expressly recognized that to be so.

2. However, we do not understand petitioners as claiming that Section 8 (c) can be directly interpreted, as a matter of grammar, to impose a one-year limitation on other reemployment rights, but only that these other rights are in themselves entirely ineffectual after initial res-

toration, that they have only a momentary existence, and that all of a veteran's real rights must stem from the "discharge" provision. But that clause cannot carry this burden since it relates only to "discharge", which "normally means termination of the employment relationship or loss of a position" (*Fishgold* case, p. 8 of slip opinion), and obviously cannot protect the veteran, even during his first year, against unwarranted changes in his employment status, which fall short of loss of his position. It is true that, as interpreted in the *Fishgold* case, discharge "from such position" is broad enough to cover "demotions". But there are many substantial detrimental changes in employment which cannot be characterized as "demotions". Reductions in pay, for instance, are often not classifiable as demotions, especially in companies without a well developed and rigid job structure. Changes in seniority status, such as that imposed on Whirls, may not constitute a loss of an old position and acquisition of an inferior one. The last clause of Section 8 (c) certainly affords no protection against such intermediate changes, and, on petitioners' theory, the veteran would be left without statutory guarantee from the first day of his reinstatement. Congress cannot have intended to leave such large portions of the returning vet-

eran's status subject to immediate and drastic change.[18]

3. Moreover, the argument that Section 8 (b) B) and the first part of Section 8 (c) have no real vitality of their own, but that effective protection lies only in the last provision of paragraph (c), cannot be harmonized with the terms Congress used or the nature of the rights it sought to protect.

a. First, as we have shown above (*supra*, pp. 26–27), "restore", "position in the employ of a private employer", "seniority", and "status", are all words connoting a continuing employment, and would have had no place if Congress had been interested, in that portion of the Act, only in bringing the veteran and his former employer together initially. Yet paragraph (b) and most of paragraph (c) have no other function in petitioner's interpretation of Section 8, since, in its scheme, it is only the "one year" clause which governs the veteran's continuing employment.

b. Secondly, cutting off the veteran's rights at the end of his first civilian year would nullify the protection Congress was careful to give to sen-

[18] In the *Fishgold* case, the Court explicitly recognized that the guarantee against demotion or termination does not encompass all the protection actually afforded to the veteran, when it said (slip opinion, p. 9) that what Congress undertook to do was to give the veteran protection within the framework of the seniority system *plus* a guarantee against demotion or termination of the employment relationship without cause for a year."

iority, insurance, and retirement benefits and rights, all of which normally grow in significance with the passage of time. Retirement rights, in particular, become of value only after many years of employment, and seniority and insurance rights progressively attain greater importance. There would be little point in taking pains to guarantee the veteran's reinstatement in such rights, if the guarantee were not to last long enough to be effective. Section 8 itself bears explicit witness to Congressional concern with securing these increasingly substantial rights. Paragraph (c) provides that the returned veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence *in effect with the employer at the time such person was inducted into such forces.*" It is difficult to believe that Congress could, on the one hand, be careful to provide that the veteran was entitled to these benefits *according to the rules* in effect *when he entered the service* (forestalling any attempt by the employer to deprive him of these benefits by changing the pre-existing rules during the veteran's military service), and on the other, have desired to remove all statutory protection at the end of one year, thus permitting the employer then to reduce the veteran's benefits by any change in rules that he desired. Rather, it is probable that

Congress intended the reinstated veteran to be secure in these benefits without limitation of time. And there is no ground for reading into the statute a distinction, as to duration of protection, between (i) seniority rights, and (ii) insurance and retirement benefits. Paragraph (c) expressly requires the veteran to be "so restored without loss of seniority"; those references to seniority were deliberately inserted to insure the retention of these significant rights by railroad and other employees. See statement of Representative May, 86 Cong. Rec. 11702, quoted in the *Fishgold* case, p. 10 of slip opinion; see also *infra*, pp. 54–58. Nevertheless, petitioners would have it that Congress was content to single out these rights for protection during a period when they would be relatively unimportant to the veteran and to withdraw its guarantee just as seniority privileges were gaining increasingly in significance.

In our view, the only proper construction is that the Act does not differentiate, as to duration of the employer's obligation, between pay, status, and seniority. As we point out below (*infra*, pp. 44–45), necessary alterations in employment conditions which are actually justified by changed circumstances are authorized within the framework of the Act, and the proper adjustment of the employer's industrial relations, through the years, need not be much troubled. Trailmobile, however, cannot conceive that the veteran's re-

stored pay and status were intended to be protected against diminution, and argues that seniority cannot be treated any more favorably (Br. 10, 15–16). We may point out, however, that it is entirely possible to interpret Section 8 as placing seniority on a different plane from pay or status. Unlike those incidents of employment, time is of the essence of seniority, and seniority rights normally grow in importance with length of service. Moreover, seniority rights, being relatively stable, ordinarily do not fluctuate with industrial conditions as wages do, nor is there usually much need for change. It would be entirely reasonable, therefore, to protect seniority (as well as retirement and insurance rights) over a longer period than pay. And there is substantial warrant, in Section 8, for believing that Congress intended such a distinction. Paragraph (c) contains no reference to pay or status, but it does single out "seniority" and "insurance or other benefits". There is an express direction that the veteran is to be "so restored *without loss of seniority*", and we need not repeat that Congress was especially intent upon protecting seniority rights. See *infra*, pp. 54–58.

Petitioners contend, however, that Whirls' seniority "is not an inherent right of employment" but is solely derived from the various expired A. F. of L. union contracts under which he worked

before entering service, or under the 1944 and 1945 agreements between the C. I. O. union and the company. The argument seems to be that, whatever may be a veteran's rights under other company seniority systems, the respondent here has no claim to continued seniority dating from 1935, since the A. F. of L. contracts are no longer in existence, and the C. I. O. agreement counts his seniority from January 1, 1944. But the Act evidently requires the reinstatement of the veteran to his pre-service seniority, if a seniority system then existed in the plant by union agreement or employer practice, regardless of expiration of the particular union contract governing seniority at the time the veteran entered service, or unfavorable change in the seniority rules during the employee's military service, unless it would be unreasonable or impossible for the employer so to restore the veteran. The Act does not create its own seniority system, but it does accord statutory sanction to systems existing at the time the veteran joined the forces. Cf. R. 77; *Elder* v. *New York Cent. R. R. Co.*, 152 F. 2d 361, 364 (C. C. A. 6). Petitioners' contrary contention would drain Section 8's careful protection of seniority rights of all meaning, since the employer would be required to restore the veteran's seniority only where he would be otherwise impelled to do so, either by a currently subsisting union contract or his own current seniority rules.

c. Furthermore, restricting the veteran's rights to his first year of reemployment would have the direct consequence of thereafter permitting the employer, or the union, to discriminate against the veteran because of his military service, or to withdraw the accumulated seniority and other rights conserved during the preceding year. Nothing would prevent the employer, for instance, from saying in effect to his veteran employee: "During your first year back at work I was forced to count your years of military service toward seniority, but now I am no longer required to do so, and, since you did not gain any experience useful to me while you were in the Army, you are hereby reduced in seniority to your level at the time you entered service, and no more." Indeed, the employer would be free to discharge all veterans simply because they were veterans. It is entirely unlikely that Congress intended to authorize such discrimination against "those who have been obliged to drop their own affairs to take up the burdens of the nation" (*Boone* v. *Lightner*, 319 U. S. 561, 575). Nor can this consequence be avoided by holding that a veteran's "right against discrimination as such", and nothing else, survives the first year. The terms of the statute simply do not permit such a construction. As we have pointed out, *supra*, pp. 20–24, its purpose extended beyond protecting the returned soldier against being penalized because of his

military career. Section 8 is framed, not in terms of broadly preventing discrimination against veterans (cf. National Labor Relations Act, 49 Stat. 449, Sec. 8; 29 U. S. C. 158),[19] but so as affirmatively to grant a series of specific positive rights. There is no general guarantee against discrimination which can survive once the specific rights have lapsed, and the Act does not envisage partial

[19] "SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

survival of these specific rights. It would require rewriting the Act to provide that the veteran's definite right to his pre-service seniority (plus accumulated time) ends for most purposes with his first year, but somehow continues in existence to protect him against a reduction grounded on discrimination against him as a veteran.

4. Petitioners imply that no rights can outlast the first year of reemployment because then the employer must be presumed to have unlimited power of dismissal, and the "whole (employment) is greater than any of its parts (seniority)" (Brief of Local 392, p. 11).

But there is a flaw in the major premise of that contention: nothing in Section 8 authorizes the employer to discharge the veteran in order to evade the obligation to accord the veteran the right which that Section grants him. Paragraph (c) does forbid discharge without cause for one year, but there is nothing in the section which expressly permits unlimited discharge thereafter, and the "one year" clause does not necessarily imply full power in the employer, at the end of the year, to dismiss the veteran without reasonable cause. A number of varying gradations in the scope of the employer's power to dismiss, after the first year, are logically open to inference. Since the statute is not express upon the point, the extent of the employer's powers must be gathered from the intent of the whole section,

with due concern for paragraph (b) (B) and the first clauses of paragraph (c), as well as for the "one year" provision. In this view, the preferred interpretation would be to recognize the employer's right, after the initial year, to discharge for any cause, except where the dismissal forms part of an attempt to evade the specific requirements of paragraph (c) or to coerce the employee to abandon those rights. Without such a restriction on the power of dismissal, there would be little significant protection for the seniority, retirement, insurance, and sick benefit rights which Congress certainly desired to secure (*supra*, pp. 33–36; *infra*, pp. 52–59), nor would the veteran be guaranteed, as he was undoubtedly meant to be, against regressive discrimination stemming from his military service (*supra*, pp. 38–40). But it is just such discrimination which the petitioner union threatens. Local 392 says (Br. 13):

> The effect of the lower Court's decision is to place the Union in a position where it must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supersede them on the seniority list, or (b) in fairness to the Trailmobile veterans, negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment. By this strained construction placed on the Act of Congress,

the Courts are turning a veteran's benefit into an absolute detriment.

It is not clear why alternative (a) involves any discrimination, inasmuch as advancement on the seniority list would not depend on prior application, but actual seniority; a Highland veteran with seniority from 1941 would still be junior to a Trailmobile veteran with seniority from 1940. As for alternative (b), that is a scarcely veiled threat to secure respondent's dismissal in the event that the judgment below is affirmed. The very suggestion of such a course of action seems to us proof positive that Congress did not intend to confer upon employers a power to discharge so unrestricted that it could destroy seniority rights of many years' standing.

We point out below, pp. 54–56, in more detail, that the protection for seniority rights was originally embodied in the Act by reason of the situation in the railway industry. There, as is well known, most employment is based on seniority. Seniority rights of railroad employees have accordingly been held to be a species of property, and they have been protected in both state and federal courts. *Nord* v. *Griffin*, 86 F. 2d 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill.); cf. *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C. C. A. 5); *Gregg* v. *Starks*, 188 Ky. 834; see Comment (1937) 47 Yale L. J. 73.

Certainly Congress could not have intended that, where a railroad employee with seniority from, say, 1926, returned from war service in 1945, the union and the railroad acting jointly could demote him after 1946 to seniority from 1940—and, if he thereafter complained or succeeded in enforcing his rights by injunction, be free to discharge him altogether.

We believe that harmonious construction of the reemployment provisions as a whole necessarily requires (1) that the employer does not have full freedom to discharge after one year where such discharge is designed to deprive the veteran of other rights accorded him under the Act, and (2) that the employer's broad but not unlimited power of discharge after the first year does not limit to one year the duration of the veteran's seniority rights.

In summary, close analysis of the terms of paragraphs (b) (B) and (c) indicates that the "one year" clause does not govern the veteran's rights incident to restoration in his old position with full pre-service seniority, but rather that this right to complete reinstatement without loss of seniority imposes a continuing obligation on the employer, enduring beyond the first year of reemployment.

D. THIS CONSTRUCTION OF THE ACT DOES NOT FREEZE THE VETERAN'S JOB AS TO ALL INCIDENTS OF EMPLOYMENT, NOR DOES IT THREATEN BURDENSOME LITIGATION

Read as we suggest its terms require, Section 8 places no time limit on the existence of the employer's obligation to maintain the returned servicemen's seniority status. Protection against unfavorable changes in employment conditions is afforded indefinitely.[20] This is not to say, however, that the veteran's job is absolutely frozen forever, in all its incidents. The statute assumes change, as new circumstances actually require, though not at the whim of the employer or of a hostile union. Section 8 (b) (B) makes it clear that when the employer's circumstances have so changed as to make it impossible or unreasonable to maintain the veteran in his old position, the statutory obligation does not bar the necessary alterations in the conditions of employment. This authorization for change is sufficiently broad to permit necessary adjustments without allowing the employer's mere convenience to deprive the veteran of his rights. *Kay* v. *General Cable Corp.*, 144 F. 2d 653 (C. C. A. 3); *Hall* v. *Union Light, Heat & Power Co.*, 53 F. Supp. 817 (E. D. Ky.). Necessary reductions in force caused by changed production requirements or altered economic condi-

[20] The Canadian Reinstatement in Civil Employment Act 1942, 6 Geo. VI, c. 31, forbids discharge of the reinstated veteran without reasonable cause, and places no time limit in this obligation, though the burden of proof as to "cause" shifts from employer to employee after six months.

tions can be made. Technological advances will warrant certain shifts in personnel requirements, and similar substantive changes in industrial techniques and practices may make it unreasonable to maintain a veteran in status quo. In the case of seniority rights, it is unlikely that many changes will normally be required. Secondly, a veteran's job, like that of any employee, can always be changed for proper "cause", just as a veteran can always be dismissed for cause. Thirdly, the veteran can voluntarily consent to a detrimental change in his employment status.[21] We suggest, though the point is outside the instant case, that it may be proper to consider a veteran's *voluntary* acceptance of union membership, and designation of the union as his collective bargaining agent, as consent to all changes in his status resulting from

[21] The factors moving the Court, in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, to outlaw waivers by employees of liquidated damages for failure to pay statutory minimum wages, and in *D. A. Schulte, Inc.* v. *Gangi*, No. 517, Oct. T. 1945, decided April 29, 1946, similarly to outlaw compromises, are not present here. Unlike the Fair Labor Standards Act, it violates no legislative policy of the Selective Training and Service Act to permit voluntary adjustments by employer and employee of their mutual rights and obligations. The Selective Service System's Handbook on its Veteran's Assistance Program states:

"Sec. 301.5 (a). A veteran, if he so desires, may waive his reemployment rights. Such a waiver, however, must be proved by clear and positive evidence and if induced by fraud, misrepresentation, or by coercive methods, threats, or force is invalid. The person claiming the waiver has the burden of proving its validity."

collective bargaining by the union with the employer. Cf. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U. S. 711; on rehearing, No. 160, Oct. T. 1944, decided March 25, 1946. This is not our case, since Whirls joined Local 392 only in order to keep his job with Trailmobile, and joined it after it had made the contract which reduced his seniority; in the face of this economic duress, he cannot be held voluntarily to have consented to the diminution of his seniority.[22]

It is unlikely that indefinite survival of these rights, together with the foregoing mechanisms of change, will cause a burdensome amount of litigation in the federal courts. Reduction in veteran's seniority or insurance rights, at least, will be comparatively rare, and amicable adjustments will probably resolve the majority of differences. In any event, as in the Fair Labor Standards Act (cf. *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523; *10 East 40th Street Building, Inc.* v. *Callus*, 325 U. S. 578, 579–580), Congress has squarely entrusted the courts with the protection of veterans' rights, regardless of the probability of litigation, and the prospect of many lawsuits should not impel the Court to narrow the rights embodied in the statute. Perhaps administrative determination of these issues would

[22] This is, of course, even more clearly apparent in the case of those veterans, former employees of Highland, who were not released from the service until November and December 1945.

have been better (cf. Note, *Veterans' Reemployment Litigation: Need for An Administrative Process* (1946) 59 Harv. L. Rev. 593) but Congress knowingly chose otherwise. As initially passed by the Senate (in the National Guard bill, *infra*, p. 53), the reemployment provisions made the failure of the employer to comply, "an unfair labor practice within the meaning of and for all the purposes of the National Labor Relations Act", and gave the district courts jurisdiction only in cases "in which no remedy is available under the National Labor Relations Act." S. Rep. No. 1987, 76th Cong., 3rd sess., p. 2; 86 Cong. Rec. 10068. The House of Representatives, however, struck out the reference to the Labor Relations Act and vested all jurisdiction in the district courts (H. Rep. No. 2847, 76th Cong., 3rd sess.; 86 Cong. Rec. 10344, 10439, 10448) and this amendment was accepted by the conference committee and embodied in the final acts. It is noteworthy that no change in the veteran's substantive rights was thought to be made necessary by the shift from administrative to judicial determination. The issues which the Senate originally thought proper for investigation and resolution by an administrative agency were the same as those which the whole Congress later referred to the courts.

E. NOTHING IN THE NATIONAL LABOR RELATIONS ACT AUTHORIZES COLLECTIVE BARGAINING AGREEMENTS WHICH PURPORT TO RESTRICT THE BENEFITS CONFERRED ON VETERANS BY THE SELECTIVE TRAINING AND SERVICE ACT

Petitioners' second specification of error[23] apparently invokes the National Labor Relations Act as a reason for denying veterans protection after their initial year. But petitioners do not deny that the Selective Training and Service Act does in some measure restrict, in favor of veterans, the scope of bargaining agreements otherwise authorized by the Labor Relations Act. Their statement of the specification itself admits that collective bargaining cannot interfere with the veteran's statutory rights *during the first year of reemployment*. In the *Fishgold* case, this Court pointed out that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act" (Slip opinion, p. 7). In cases under Section 8, the issue is whether the statute grants the protection asserted by the veteran; if it does, the right clearly cannot be taken away by an otherwise valid union contract. This does not mean that Section 8 amends or *pro tanto* repeals the Labor Relations Act, or circumscribes the powers it secures to the bargain-

[23] The second specification of error is as follows:

"The Circuit Court of Appeals erred: * * * 2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all other similarly situated) seniority status."

ing representative. That Act was intended to guarantee freedom of collective bargaining from employer coercion; it did not intend, in granting broad collective bargaining powers to the employees' representative, to validate agreements the substance of which would contravene other federal statutes dealing with specific industrial problems. The Labor Act, for example, does not free the union and the employer from the reach of the Anti-Trust Acts, where they otherwise apply (cf. *Allen Bradley Co.* v. *Union*, 325 U. S. 797), nor from the provisions of the Criminal Code relating to mutiny (*Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31), nor does it permit contracts in contravention of the Fair Labor Standards Act (*Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 602; *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161, 167). Similarly, nothing in the Labor Act authorizes union agreements contravening Section 8 of the Selective Training and Service Act, and there is therefore no conflict between the two statutes.

Moreover, the Selective Training and Service Act plainly declares a congressional reemployment policy, applicable alike to all veterans, regardless of the existence of a collective bargaining relationship or other private arrangement between a union and their employer. There is nowhere to be found in the Act any indication that veterans' rights are to be differently protected,

depending upon whether or not they are covered by collective bargaining agreements. If petitioner may bargain collectively concerning Whirls' seniority, regardless of Section 8, then an employer's self-imposed personnel practices may likewise reduce a veteran's seniority. Thus, the existence of the Labor Act gives petitioners no special dispensation from the statute, nor is that Act a valid reason for narrowly construing the veteran's rights under Section 8. Just as the Selective Training and Service Act cannot be construed to permit the employer to exact by threat of discharge the veteran's "agreement" to a change in his conditions of employment (see pp. 40–43, *supra*), so a veteran who joins a union solely to prevent his own dismissal under the terms of a closed-shop contract cannot be held voluntarily to have consented to the union agreement under which his seniority rights were reduced.

II. THE LEGISLATIVE HISTORY OF SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT SHOWS THAT CONGRESS INTENDED THE VETERAN'S RESTORED SENIORITY STATUS TO CONTINUE BEYOND THE FIRST YEAR OF REEMPLOYMENT

The legislative history of Section 8 of the Selective Training and Service Act discloses a strong and consistent congressional intention supporting our construction of the Act. Paragraph (b) (B), directing the employer to restore the veteran to his former position or to one of like

seniority, status, and pay, and the first part of paragraph (c), stating that the restored veteran is to be considered as having been on furlough or leave while in military service, etc., were treated as separate and distinct from the last clause of the latter paragraph—prohibiting discharge without cause within the first year—and were very clearly intended to have a value of their own. Rights of equality of position without loss of seniority of position were viewed as having substantial importance to the veteran, and the one-year limitation was never mentioned in connection with those rights.

In tracing the development of Section 8 of the Selective Training and Service Act, the legislative history of both that Act and the National Guard Act is pertinent, since both were simultaneously under consideration, and because a deliberate attempt was made to keep their reemployment provisions identical. Changes made in one were incorporated into the other without further debate.

As originally introduced in the 3d Session of the 76th Congress, neither S. J. Res. 286, which eventually became the National Guard Act, nor S. 4164 and H. R. 10132, which became the Selective Training and Service Act of 1940, contained any provisions concerning reemployment. Such provisions were first inserted by the Senate Committee on Military Affairs in its considera-

tion of S. 4164, the first of the two measures to be proposed; and it is in the successive Committee prints of S. 4164 that we find the development of what is now Section 8 from a pious hope into a command backed up by effective sanctions.

The first draft of the Senate Military Affairs Committee declared it to be "the purpose and intent of the Congress that every man who is called from a job when inducted * * * ought to be reemployed in such job or an equally good one without loss of seniority * * *." Committee Print No. 1, July 23, 1940. In the fourth committee draft the reemployment provisions of the Act had been broadened to include a statement that it was "the purpose and intent of the Congress that every man who is called from a job * * * with a private employer * * * be reemployed in such job or a comparable one without loss of seniority or benefits or insurance participation and benefits * * *." Committee Print No. 4, July 27, 1940. The fifth committee draft ordered private employers to restore the returning veteran to his former position "or to a position of like status and pay" (Section 8 (b)). The veteran's rights upon restoration were made the subject of a separate section (Section 8 (c)) which provided that he "shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without

cause within one year after such restoration." Committee Print No. 5, July 31, 1940.

While these reemployment provisions were developed during Senate Military Affairs Committee consideration of S. 4164, they were first debated in Congress in connection with S. J. Res. 286 which, although introduced much later than S. 4164, was reported earlier. S. J. Res. 286, introduced on July 30, 1940 (86 Cong. Rec. 9684), was reported the same day with the addition of the reemployment provisions developed by the Committee in connection with S. 4164. See S. Rep. No. 1987, 76th Cong., 3d sess. These provisions contained a paragraph similar to Section 8 (b) (B) of the present Act (but with reference only to "a position of like status and pay"), and paragraph (c) identical with the paragraph (c) originally enacted in the National Guard Act.[24] The Senate passed the National Guard bill without any change in the Committee-recommended reinstatement provisions. '86 Cong. Rec. 10068. The House Committee on Military Affairs, however, recommended the elimination of paragraph (c), including the

[24] Section 3 (c) of the National Guard Act originally read as follows (54 Stat. 858, 860):

"Any person who is restored to a position in accordance with the provisions of paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration."

"one-year" provision (H. Rep. No. 2847, 76th Cong., 3d sess.), but inserted the term "seniority" in paragraph (b) (B); and the House accepted both amendments without debate. 86 Cong. Rec. 10439, 10448. In conference, paragraph (c) was restored and the House's insertion of "seniority" in paragraph (b) was adopted in order to ensure the preservation of the seniority of returning servicemen as well as their status and pay (H. Rep. No. 2874, 76th Cong., 3d sess.). The Chairman of the House Military Affairs Committee explained the addition of the references to seniority (86 Cong. Rec. 10761):

> * * * You will find that in amendments number 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

S. J. Res. 286 was passed by both Houses with these changes. 86 Cong. Rec. 10759–10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858.

These reemployment provisions were then carried over, without further consideration, into the selective service bill (86 Cong. Rec. 10922–10923) with a further amendment elaborating paragraph (c) to its present form. 86 Cong. Rec. 10914, 11702. It was changed to read as follows, the italicized portions indicating the added and amended language:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered during the period of service in such forces as on furlough or leave of absence; and* shall be so restored without loss of seniority; *and shall be entitled to participate* in insurance or other benefits *offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces,* and shall not be discharged from such position without cause within 1 year after such restoration.[25]

[25] This change was then made in the appropriate section of the National Guard Act, previously passed, so as to conform the two statutes. See Section 8 (d) of the original Selective Training and Service Act, 54 Stat. at 891, amending Section

The chief purpose of this amendment, according to Chairman May, was (86 Cong. Rec. 11702)—

> to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Throughout the Congressional consideration of the reemployment provisions, both in the National Guard and the selective service bills, the independent substantiality of the right of restoration to a job without loss of seniority was never questioned nor was its limitation to one year ever suggested. The amendments further protecting seniority and insurance rights, quoted above, provide one revealing instance of this uniform attitude. General Senate and House debate evidenced the same intention. Senator Sheppard, Chairman of the Senate Military Affairs Committee, described Section 8 as an at-

---

3 (c) of the National Guard Act. The only difference then remaining reflected the different character of the military service involved. Section 8 (c) of the Selective Training and Service Act referred to "the time such person was inducted into such forces," while Section 3 (c) of the National Guard Act as amended spoke of "the time such person was ordered into such service."

tempt "to prevent loss of seniority, accrued employment benefits * * * and other beneficial programs," (86 Cong. Rec. 10095) and the identical provision in the National Guard Act as an effort to insure that returning veterans be restored "to their former employment at the end of their training or to employment of similar pay and status." He further explained that "Persons restored to * * * positions in private employment shall be so restored without loss of seniority, insurance participation, or other benefits, and such persons shall not be discharged from such positions without cause within 1 year after such restoration." (86 Cong. Rec. 9836). Senator Thomas, another member of the Senate Military Affairs Committee, referred to Section 8 as an attempt "* * * to make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." (86 Cong. Rec. 10572). Representative Celler considered Section 8 as a direction to private employers to restore the returning veteran "to [his original] position or to a position of like seniority, status, and pay * * *", and that under these provisions, "All those who serve shall have the right to claim return to their jobs". 86 Cong. Rec. 11435. Representative Healey stated that "You have held out to these men you are going to induct into service that you will restore

them insofar as you have the power to restore them to their status quo before they were inducted into the service" (86 Cong. Rec. 11703) and Representative Jennings put it that the bill "admonishes employers, whose employees are drafted into the service under the act, to take such employees back and put them in their jobs * * *." 86 Cong. Rec. 12221. Other Congressmen described the reemployment provisions as directing the employer to "rehire" (86 Cong. Rec. 10107); as a provision to "conscript" the servicemen's "jobs" (86 Cong. Rec. 10487); and as securing "reemployment" (86 Cong. Rec. 11697). This note of the independence, substantiality, and stability of the right to restoration is consistently struck in the course of debate.

Perhaps the most significant detail, for the present case, in the history of these provisions is the elimination of paragraph (*c*) by the House in its consideration of the National Guard bill. See pp. 53–54, *supra*. Neither the House Committee on Military Affairs nor the House gave an explanation of this change, but at the very least it is plain that the House considered paragraph (b) (buttressed by an explicit reference to seniority) as separate and distinct from the discharge clause of paragraph (*c*), and independently effective to protect the veteran. Nor can it be that this independent effectiveness was thought to be limited to the initial moment of reinstatement,

and that thereafter the veteran was entirely on his own. To the House, paragraph (b) constituted all of the veteran's reemployment rights, and it is difficult to suppose that that body, which was intent on opening the Federal courts to all veterans seeking restoration and on giving them Federal counsel without expense (86 Cong. Rec. 10344, 10439, 10443–10444), intended to grant veterans a wholly illusory "right" which would expire as soon as it was born. On the contrary, the tenable explanation appears to be that the House viewed the guarantees of paragraph (b) as substantial and also legally effective for an indefinite period of time. The addition of paragraph (c) could not have been designed to excise from paragraph (b) its previously intended effectiveness, but only to make explicit the full scope of certain protected rights and to add new ones.

In connection with the survival of seniority rights, the recent amendment of the Act continuing Section 8 indefinitely (see note 13, *supra*, p. 28) has significance. The amendment was intended to make the section "permanent law" (Statement of Managers on the part of the House of Representatives, 92 Cong. Rec. 7479 (daily ed.)) and "perpetual" (statement of Chairman May, 92 Cong. Rec. 3659 (daily ed.)). Chairman May stated: "Section 8 of the act is the one that guarantees a man priority or seniority rights to a job, or to his old job when he returns from the

service and we have maintained that provision and made it perpetual so long as the act is in effect." At the same time, Section 8, together with other provisions of the Act, was specifically reenacted. It is unlikely that Congress would have thought it necessary to enact Section 8 into permanent law, if all veteran's reemployment rights would expire within a year after initial reinstatment. An extension of time for a relatively short period—the expiration date of the Act, plus the required length of service of the last inductee thereunder, plus the ninety-day option period, plus the first year of reemployment; i. e., 42 months in all—would have afforded ample protection of the kind petitioners here concede to the veteran. The circumstance that Congress chose instead to make the right perpetual appears to us additional proof that our construction of the seniority privilege is the correct one.

III. PETITIONERS' INDIVIDUAL DEFENSES TO WHIRLS' CLAIM FOR PROTECTION OF HIS RESTORED SENIORITY STATUS ARE INVALID.

Petitioners suggest certain considerations, special to this case, which they appear to believe should bar Whirls from receiving judgment, although their briefs do not formulate these considerations into actual defenses.

A. No substantial claim is made that it would be either unreasonable or impossible to reinstate

respondent in his status of seniority as of 1935.[26] Without invoking that defense, the company states that because of the opposition of Trailmobile's old employees, "chaotic labor conditions will result if the court below is affirmed", and an oblique threat to discharge Whirls is made, both by Trailmobile (Br. 19–20) and by Local 392 (Br. 13). But intense opposition by the employees to respondent's enjoyment of his statutory rights cannot be used to divest him of those privileges, any more than determined opposition of townspeople has been permitted to turn the exercise of the right of free speech into a nuisance to be enjoined (*Hague* v. *C. I. O.*, 307 U. S. 496, 516), or than public passion and the pressure of a mob have been allowed to deny to unpopular individuals the essential features of a fair trial (*Moore* v. *Dempsey*, 261 U. S. 86).

The rights granted by Section 8 of the Selective Training and Service Act are not to be evaded because of group hostility. As to the implied threat of discharge, it is enough to say that we do not believe that, in the event of affirmance, Trailmobile will be able to dismiss Whirls for the reason, directly or indirectly, that he insists on his rights under the Act. See pp. 40–43, *supra*.

[26] This issue was not presented to the lower courts nor is it presented on the petition for certiorari, or included in the assignment of errors. The lower courts made no findings on the point.

Nor do we believe that Local 392 will be free to negotiate for his discharge for a like reason.

B. Petitioners also suggest that, because of the merger, maintenance of respondent's 1935 seniority status would discriminate against (a) those Trailmobile veterans with seniority post-dating that of Whirls, and (b) other former Highland employees who are not veterans and are bound by the decision of the Ohio courts in the *Hess* litigation. The situation of the latter group is no different from that of any other body of non-veterans faced with a legally permissible change in their conditions of employment; they can hardly complain that Section 8 works, as it was intended, to accord a veteran special protection from such alterations in his status, nor can they use the resultant "discrimination" to defeat the veteran's rights. As for the Trailmobile veterans with inferior seniority, it is true that Whirls' reinstatement makes it impossible for them to receive exactly the same seniority status as they previously had, but, in all probability, Whirls' position on the consolidated seniority roster is likewise somewhat changed because of the merger. It is that which has made it impossible to restore each veteran to his exact place on the seniority lists, but there is no reason to believe that the minor readjustments in standings necessitated by the consolidation are substantial enough to derogate from either Whirls' or the Trailmobile vet-

erans' rights. Section 8 (b) (B) entitles them only to a position of "like" seniority—not a position of precisely the same seniority but of substantially the same.

C. We have already pointed out that respondent's enforced joining of petitioner union in June 1945 in order to save his job (R. 65) cannot be deemed binding adhesion to the terms of the new union agreement reducing his seniority, nor consent to such a change in his protected status. See *supra*, pp. 45–46. Petitioners faintly suggest, but do not press, this point.

D. We have likewise pointed out, pp. 11–12, *supra*, that, after the decision below in Whirls' favor and while the petition for certiorari was pending, Local 392 informed Whirls, by letter dated April 10, 1946, that he was charged with "conduct unbecoming a member of the Union." The specifications of this charge included the institution of the present action in Civil Court without exhausting your remedies provided by the Union," violation of the Union contract, negotiating for himself through others than the Union, and a catch-all specification of conduct contrary and harmful to the interests of the Union and its members.

The crux of the matter appears to be the institution and successful prosecution of the instant action authorized by Section 8 (e) of the Selective Training and Service Act. We do not believe

that Local 392 can validly expel or suspend respondent (and thus cause his dismissal by Trailmobile) simply because he chose to exercise his statutory right to sue to force his employer to comply with Section 8 (b) (B) and 8 (c).

In the first place, it is not clear that the constitution of Local 392 expressly prohibits members from resorting to the courts in these circumstances; and courts are wary of reading this prohibition into general provisions disciplining conduct unbecoming a member or requiring amicable adjustment of controversies. "An intention to deny all access to the courts of the land will not be presumed. If it be enforceable at all, it must be unmistakably expressed." *Burke* v. *Monumental Division,* 273 Fed. 707 (D. Md.); cf. *Polin* v. *Kaplan,* 257 N. Y. 277. But, in any case, an express union rule forbidding consultation with an attorney or the institution of suit to vindicate legal rights would be invalid. *Lo Bianco* v. *Cushing,* 115 N. J. Eq. 558 (Ct. Err. & App.); *Collins* v. *International Alliance,* 119 N. J. Eq. 230, 248 (Ct. Ch.). This result follows from the paramount public policy which jealously guards the exercise of all rights of access to court and legislature against union attempts to restrict a member's civil rights, especially where expulsion from the union is tantamount to loss of employment. Rules have been held invalid which provide for the expulsion of

members testifying in court to the injury of other members (*Thompson* v. *Grand International Brotherhood,* 41 Tex. Civ. App. 176), for voting as a member of a public board for a candidate for a city position other than one recommended by the union (*Schneider* v. *Local Union No. 60,* 116 La. 270), for refusing to pay a union insurance assessment previously held illegal by a court (*Sweetman* v. *Barrows,* 263 Mass. 349), for urging the state legislature to defeat a bill sponsored by the union's legislative representative (*Spayd* v. *Ringing Rock Lodge,* 270 Pa. 67), or for voting for another union in a federally conducted collective bargaining election (*Ray* v. *Brotherhood of Railroad Trainmen,* 182 Wash. 59).

Here, Congress has expressly opened the federal courts to employees believing themselves deprived of reemployment rights under the Selective Training and Service Act and has provided for representation of the veteran by the United States Attorney, if that official is "reasonably satisfied that the person so applying is entitled to such benefits." The United States Attorney for the Southern District of Ohio was satisfied that respondent was entitled to his rights under Section 8, and undertook to represent him; the District Court and the Circuit Court of Appeals have upheld respondent's claim. In the face of the specific provisions of Section 8 (e)

and the reasonableness of Whirls' suit, it cannot be consonant with sound public policy to penalize him for the institution of this action. The union's letter of April 10, 1946, makes some point of Whirls' alleged failure to exhaust union remedies, but it is clear, even from this record, that respondent and his fellow Highland employees tried for over a year to remedy their plight and that further recourse to the union would be wholly useless. A union member cannot be required to resort further to union tribunals where such action would clearly be in vain or the charge against him is invalidated by public policy. *Cameron* v. *International Alliance,* 118 N. J. Eq., 11, 20 (Ct. Err. & App.); *Ray* v. *Brotherhood of Railroad Trainmen,* 182 Wash. 39. Furthermore, grave doubts as to the union's good faith in seeking to punish respondent are raised by the facts that disciplinary action was not taken against him during the unsuccessful *Hess* litigation (commenced July 17, 1944) in which he was named as one of those on behalf of whom the suit was brought, nor at the time he instituted the present case in September 1945, but only after he had succeeded in the District Court and the Circuit Court of Appeals, and the petition for a writ of certiorari was about to be filed in this Court.

It is difficult to escape the conclusion that Local 392 is simply seking to destroy Whirls' judicially

validated rights through the control which its closed shop contract gives to it over Trailmobile's employment policy. And Local 392 concedes as much (Br. 13), when it says that the effect of the decision below is to place the union in a position where it must "negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment." Whirls would then, of course, lose his livelihood, a contingency for which Local 392 holds the judiciary to blame (Br. 13): "By this strained construction placed on the Act of Congress, the Courts are turning a veteran's benefit into an absolute detriment."

We should not like our failure to explore the nature and causes of petitioners' differentiation in treatment, in the collective bargaining agreements of 1944 and 1945, of the former Highland employees, to be construed as an admission either (a) that the treatment of Whirls and his fellow employees did not constitute unfair discrimination under *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginmen*, 323 U. S. 210; and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248; cf. *Hunt* v. *Crumboch*, 325 U. S. 821, 826, or (b) that such unfair discrimination cannot be redressed under Section 8 of the Selective Training and Service Act after the lapse of the initial year of reemployment, whether or

not enforced non-discriminatory changes are barred by the Act.

These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party on the issue of unfair discrimination. Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556. In view of that fact, and of the *Hess* litigation, we believe that it would be inappropriate, at this stage, to argue these issues.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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NOVEMBER 1946.

APPENDIX

The Selective Training and Service Act of 1940 as originally enacted September 16, 1940, c. 720, 54 Stat. 885, 50 U. S. C. App. 301 *et seq.*, provided in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.
>
> (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.
>
> * * * * * *
>
> SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes ap-

plication for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have

power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * *

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed

any period of their training and service under this Act.

* * * * *

SEC. 16. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1945 * * *.

By Act of December 8, 1944, c. 548, 58 Stat. 798, 50 U. S. C. App. Supp. V, 308, Section 8 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to

a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

By Act of May 9, 1945, c. 112, 59 Stat. 166, Section 16 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

(b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1946, or the date of the termination of hostilities in the present war, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, * * * As used in this section the term "date of the termination of hostilities in the present war" means the date proclaimed by the President as the date of such termination or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

The Act of June 29, 1946, Public Law 473, 79th Cong., 2d sess., c. 522, provided in part as follows:

SEC. 1. * * * all of the provisions of the Selective Training and Service Act of 1940, as amended, are hereby expressly reenacted, except those provisions which are hereinafter amended or repealed.

* * * * *

SEC. 7. Section 16 (b) of such Act, as amended, is amended to read as follows:

"(b) The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12

o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8, and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. One day prior to the date of the termination of the Selective Training and Service Act of 1940, as amended, as herein or hereafter specified, all remaining functions and responsibilities of the Personnel Division established under the authority of section 8 (g) of such Act, and all records and balances of appropriations which have been utilized or are available for use in the administration of such functions of the Personnel Division of the Selective Service System, shall be transferred to such agency of the Federal Government as the Congress may designate, or, if none is so designated, to such agency of the Federal Government as the President may designate."

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October Term, 1946

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Respondent.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 85

THE TRAILMOBILE COMPANY,
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL WORKERS OF AMERICA, U.A.W.-C.I.O.,

Petitioners,

vs.

LAWRENCE WHIRLS,

Respondent.

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

STATEMENT OF FACTS

The facts have been fully stated in the briefs of the principal parties and will be merely summarized here. On October 23, 1942, the respondent Whirls, then an employee of the Highland Body Company (a subsidiary of the Trailer Company of America, whose name was subsequently changed to The Trailmobile Company) was inducted into the armed forces of the United States. At

that time he and his fellow employees were working under a seniority system established by collective bargaining agreement between his employer and his collective bargaining representative. Pursuant to the rules of this agreement, Whirls was considered as having a seniority date of February 8, 1935.

Whirls was ultimately discharged from the armed forces and thereafter on May 3, 1943, was reemployed in his former position with his original seniority date. This situation remained unchanged until January 1, 1944, when the operations of the Highland Body Company were merged with those of the parent corporation and Whirls became an employee of the latter, still performing the same type of work. By agreement between the employer and the collective bargaining representative, he was permitted to carry with him into his new employment his seniority date with the Highland Body Company, namely, February 8, 1935. This situation continued until July 15, 1944. In the interim, the original collective bargaining representative of the employees of this company had been supplanted by another, selected through an election conducted by the National Labor Relations Board. The new representative undertook to make a collective bargaining contract by which a readjustment of seniority dates was brought about. This contract, effective July 15, 1944, provided that all former Highland Body employees would be given dates on the Trailmobile seniority roster corresponding to the date of their transfer to the payroll of that company (January 1, 1944), instead of their old seniority dates with the Highland Body Company.

This suit was brought by Whirls alleging that the change in the seniority dates was in violation of his rights as a returned veteran under Section 8 of the Selective Training and Service Act. Both the District Court and

the Circuit Court of Appeals sustained Whirls' contention, and the case is before this Court on *certiorari*.

ISSUE RAISED

The only issue which appears to be involved in this case is that of whether an employer and the duly accredited collective bargaining representative of its employees can lawfully alter by contract the date on the basis of which the seniority and seniority rights of an employee are to be computed if that employee is a veteran who was reemployed more than one year prior to the alteration in question.

The discussion of this issue may, we believe, be facilitated by dividing it into two components, *viz.*:

First, was the contractual alteration of seniority dates of Highland Body employees generally a lawful exercise of the function of collective bargaining?

We recognize the fact that this question does not go directly to the heart of this controversy. We deem it necessary, however, that it be discussed briefly in order to eliminate from consideration certain extraneous elements contemporaneous with, but not legally related to the operative facts upon which this case must hinge. A showing that the *general* alteration of seniority dates was accomplished lawfully and as a result of the legitimate exercise of collective bargaining authority will serve to focus consideration more clearly and accurately upon the further and, as we see it, the essential issue in this case, *viz.*:

Second, does any provision of the Selective Training and Service Act confer upon the veteran reemployed for more than one year after his discharge an immunity from an otherwise lawful alteration of any seniority right which he holds?

Otherwise stated, do veterans discharged and reemployed for a period of more than one year, possess by statute certain individual rights in relation to their seniority and employment which are held by them alone, which are superior to the group rights and interests of their fellow employees, and which are immune to change by the lawful exercise of collective bargaining authority?

OUTLINE OF ARGUMENT

In discussing the issues above noted, we will support the following propositions in this brief:

I. The general alteration of seniority dates of former Highland Body employees was lawfully consummated, because

A. Rights of seniority are subject to alteration by contract unless such contract is arbitrary or discriminatory.

B. The contract in this case has been determined to be neither arbitrary nor discriminatory.

II. The Selective Training and Service Act does not exempt veterans reemployed for more than one year from such changes in seniority standing as may be made lawfully in relation to other employees, because

A. The Act does not create seniority rights in veterans but merely preserves to them seniority rights already existing.

B. Any other conclusion would produce chaotic results incompatible with orderly and settled labor relations.

I. THE GENERAL ALTERATION OF SENIORITY DATES OF FORMER HIGHLAND BODY EMPLOYEES WAS LAWFULLY CONSUMMATED

A. Rights of Seniority Are Subject to Alteration by Contract Unless Such Contract Is Arbitrary or Discriminatory

In any discussion of seniority systems and of the rights of employees thereunder, it is essential that a clear understanding be had of certain terms commonly used in this connection, such as seniority, seniority rights, seniority dates, seniority districts, seniority rosters, etc.

The word "seniority" standing alone, refers merely to the lengths of service periods of employees in relation to one another. Seniority as such has no legal significance. It attains significance only when rights are created in employees, the measure of the enjoyment of which is made dependent upon their relative seniority standings. Such rights, when created, are seniority rights. They are rights of preference in relation to certain phases of employment, such as furloughs, promotions, choice of work time, and the like. It is only when such rights are attached to the mathematical fact of seniority that seniority itself attains importance.

As a general proposition the attachment of rights to the seniority of employees is accomplished only by contract. The common law of master and servant never recognized the existence of any right flowing from length of service. Insofar as we know, there is no statute which creates any such right unless the Selective Training and Service Act can be interpreted as doing so in connection with returned veterans. Whatever decision may be reached in relation to the effect of this statute, it may be fairly stated that as to employees generally, the sole

source from which seniority rights have accrued to them is through some form of private contract. Almost universally, this source has been a collective bargaining agreement.

Many cases involving seniority rights have arisen in the state courts, and frequent expressions are to be found in their opinions to the effect that seniority rights are contractual in nature. Thus, in the case of *Ryan vs. New York Central Railroad Company*, 267 Mich. 202, the court said:

> "He (the employee) has no inherent right to seniority in service nor do such rights arise out of his employment by the railroad company except as provided for in the contracts entered into and the rules adopted by the company relating thereto." (Portion in parentheses not a part of quotation.)

See also to this same effect, *Polanskey vs. Monongahela Railway Company*, 342 Pa. 188, 19 Atl. (2d) 377; *Boucher vs. Godfrey*, 119 Conn. 622, 178 Atl. 655, and *Shaup vs. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202.

Seniority rights differ in their attributes among themselves, depending on the terms of the contracts which create them. They may be exercisable over an employer's whole field of operations or they may be and usually are limited to a single plant, point, or job classification. Where seniority rights are effective only within certain geographical limits, such limits constitute what is known as a "seniority district."

Inasmuch as seniority rights depend upon priority of service, it is essential that a date be determined from which the individual's seniority is to be computed. This is his "seniority date." It might appear that fixing such a date would be a matter of merely checking employment records. The task, however, is not that simple. Em-

ployees may have worked for the same employer at different times or places, or in different jobs. The service period may have been interrupted by furloughs or leaves of absence, or by outright resignations followed by reemployment. The collective bargaining agreement ordinarily contains rules for the fixing of seniority dates which take all such eventualities into consideration. In the application of such rules controversies frequently arise, and the rules themselves often require modification.

When seniority districts and dates are determined, the employer normally publishes a list containing the names of those employees who are entitled to exercise rights of seniority against one another, the names being arranged in order of seniority. Such lists are called "seniority rosters."

It is well established that a *bona fide* collective bargaining representative of employees has the right to modify and even to eliminate all phases of seniority rights by modifying the agreement with the employer out of which those rights arose. In the case of *Hartley vs. Brotherhood of Railway & Steamship Clerks*, 283 Mich. 201, 277 N. W. 885, the court made the following statement:

> "The brotherhood had the power by agreement with the railway to create seniority rights of plaintiff, and it likewise by the same method has the power to modify or destroy these rights in the interest of all of the members."

To this same effect, see also *Brisbin vs. E. L. Oliver Lodge, No. 335*, 134 Neb. 517, 279 N. W. 277; *McMurray vs. Brotherhood of Railroad Trainmen*, 50 F. (2d) 968; *Donovan vs. Travers*, 285 Mass. 167, 188 N. E. 705; *Aden vs. Louisville & Nashville Railroad Company*, 276 S. W. 611; *Aulich vs. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560; *Ryan vs. New York Central Railroad Company*, 267 Mich. 202, 255 N. W. 365; *George T. Ross Lodge vs. Brotherhood*

of Railroad Trainmen, 191 Minn. 373, 254 N. W. 590; *Burger vs. McCarthy*, 84 W. Va. 697, 100 S. E. 492; *Order of Railway Conductors of America vs. Shaw*, 119 F. (2d) 549 (Oklahoma); *Evans vs. Johnston*, 300 Ill. App. 78, 20 N. E. (2d) 841; *Franklin vs. Pennsylvania Reading Seashore Lines*, 122 N. J. Eq. 205, 193 Atl. 712; *Harris vs. Missouri Pacific R. Co.*, 1 F. Supp. 946; *Lockwood vs. Chitwood*, 185 Okla. 44, 89 P. (2d) 951; *Long vs. Baltimore & O. R. Co.*, 155 Md. 265, 141 Atl. 504; *Louisville & N. R. Co. vs. Miller*, 38 N. E. (2d) 239 (Ind. 1941); *Noles vs. Terminal R. R. Assn. of St. Louis*, 154 S. W. (2d) 606 (Mo. 1941); *Coley vs. Atlantic Coast Line R. R.*, 221 N. C. 66, 19 S. E. (2d) 124.

The power of the employer and the employees' collective bargaining representative to alter seniority rights by contract is not an unlimited one. In many cases it has been recognized that it must be exercised fairly and reasonably and without arbitrary discrimination. This limitation, as attaching to all phases of collective bargaining, was clearly recognized by this court in the case of *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192, and *Tunstall vs. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210.

From these numerous authorities, therefore, we conclude that where the collective bargaining representative of employees has acted to create seniority rights by agreement with the employer, it or a successor representative may further act to modify, alter, or even destroy such rights by further contract, provided that in so doing, its conduct is free from any taint of arbitrary or discriminatory action. Thus, it appears that in the absence of any such taint, the collective bargaining representative of the employees of the Trailmobile Company had a clear right to modify the seniority dates or any other incidents of seniority rights of the employees generally. It remains

to be seen whether the action of the representative was in fact arbitrary or discriminatory.

B. The Contract in This Case Has Been Determined to be Neither Arbitrary Nor Discriminatory

The Highland Body employees, transferred to the payroll of the Trailmobile Company, insisted at the time of the transfer that the years of seniority accruing to them in the service of their original employer should be credited to them in relation to service with their new employer. Normally such a credit is not accorded to employees changing employment but in this case, by agreement between the employer and the then collective bargaining representative of the employees, the claim of the former Highland Body employees was granted. A change in collective bargaining representatives, however, brought about a change of agreement of such nature that they were denied the preference which they sought.

A representative suit was brought in the Ohio courts by a former Highland employee who asserted that he acted in behalf of a group of others similarly situated, Whirls being named as a member of that group. The action was one for declaratory judgment and injunction, and sought to set aside the agreement by which the plaintiffs had been assigned seniority dates with their new employer, corresponding to the date when they were transferred to its payroll. It was alleged that this agreement had been negotiated as a result of a collusive plan to arbitrarily deprive the plaintiffs of seniority rights.

The trial court held that no evidence of such a plan had been presented and that the collective bargaining representative "had the right, under the law, to enter into the agreement it did." *Hess vs. Trailer Company of America*, 31 O. O. 566, 569. This decision was subsequently

affirmed by the Ohio Court of Appeals (R. 54) and a motion to certify the record to the Supreme Court of Ohio for review was denied.

Earlier in this brief we pointed out that seniority rights are not immutable. They are the creatures of contract and like other contract rights, may be altered at will by the contracting parties so long as the alterations are not arbitrary or discriminatory. The significance of the case of *Hess vs. Trailer Company* is that it constitutes a final adjudication to the effect that the general alteration in seniority dates of former Highland employees was not arbitrary or discriminatory and hence was a lawful act.

From all of the foregoing certain conclusions may be fairly drawn in relation to the facts and issues of the present case, which are as follows:

(1) At the time of his induction into the armed forces the respondent Whirls held certain rights of seniority based upon contract. Among these was the right to have his seniority computed as of February 8, 1935.

(2) All of the seniority rights of Highland Body employees generally were subject to modification by joint agreement between their collective bargaining representative and their employer, subject only to the qualification that any modification made must not be arbitrary or discriminatory.

(3) It has been decided by the courts of the State of Ohio in an action properly within the jurisdiction of those courts that the conduct of the collective bargaining representative in this case was not arbitrary or discriminatory, but that it constituted a lawful exercise of its collective bargaining authority.

These three conclusions determine the present rights of *Whirls, the employee.* Had Whirls never entered the armed forces at all, and were he presently employed by Trailmobile Company in his present capacity, his senior-

ity date would be legally determined as being January 1, 1944, exactly the same as that of other former Highland employees.

Whirls asks, however, that his seniority be considered as dating from February 8, 1935, not because of any factor inherent in the employment relation or any deficiency in the acts of his collective bargaining representative, but solely because he is a returned veteran. For this reason alone, he claims a special seniority status, higher than that of his fellows, and superior to what he would have held had he not entered the armed forces. Thus, we are called upon to consider next the rights of *Whirls, the veteran*, rights which, if they exist at all, must exist by virtue of some provisions in the Selective Training and Service Act.

II. THE SELECTIVE TRAINING AND SERVICE ACT DOES NOT EXEMPT VETERANS REEMPLOYED FOR MORE THAN ONE YEAR FROM SUCH CHANGES IN SENIORITY STANDING AS MAY BE MADE LAWFULLY IN RELATION TO OTHER EMPLOYEES

A. The Act Does Not Create Seniority Rights in Veterans But Merely Preserves to Them Seniority Rights Already Existing

As we understand the opinion of the Circuit Court of Appeals, it is predicated upon the proposition that the Selective Training and Service Act should be construed as creating in the returned veteran certain rights in relation to his seniority standing not enjoyed by him prior to induction and not shared by fellow employees who have not been in military service.

In the first place, it should be noted that this contention is very similar in nature to the idea of "super-seniority," which was adopted by the District Court for the Southern District of New York in the case of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 62 F. Supp. 35, and which was subsequently repudiated by the United States Circuit Court of Appeals for the Second Circuit and by this court.* The claims made in both cases are in essence the same, *i.e.*, that the veteran has certain rights of seniority, not because he is an employee but because he is a veteran, which rights are not derived from contract but are conferred upon him by statute. In the *Fishgold* case, the right asserted was that of working although others higher than the veteran in point or seniority were idle. Here the claim is that the veteran has a superior right to immunity to those changes which may be normally and legally made in seniority rights in the course of continued collective bargaining. While differing in detail it is apparent that both of these claims rest essentially upon the proposition that the Selective Training and Service Act has created *special* seniority rights in veterans which they and they alone can enjoy. That proposition was rejected by this court in the *Fishgold* case and we submit, should be rejected here.

In order to establish the soundness of this conclusion, it is necessary to analyze the provisions of Section 8 of the Act, in order, first, to eliminate from consideration all portions thereof which are not relevant to this case, and secondly, to isolate for further study any provisions which have been or conceivably might be pointed to as

* The opinion of the Circuit Court of Appeals below was issued before the *Fishgold* case was finally decided. The identity of the ideas underlying the claim of the petitioner in that case and that of the respondent here is strikingly revealed by the fact that the Circuit Court in this case felt it necessary, on page 871 of the report of its opinion, to criticize adversely the result reached in the *Fishgold* case by the Circuit Court of Appeals for the Second Circuit.

bearing upon the issues here involved. In making this analysis we shall follow that made by this court in the opinion in the *Fishgold* case, noting the significance of each provision of the statute in relation to the issue here. The court listed four benefits as being conferred upon the veteran by statute, as follows:

(1) "He has a stated period of time in which to apply for reemployment." The rights of the respondent Whirls in this connection have been accorded full recognition and he can accordingly predicate no claim upon this portion of the statute.

(2) "He must be restored to his former position 'or to a position of like senority, status and pay'." Here, too, the respondent has no complaint, inasmuch as he was actually restored to his former position after his discharge from the armed services. There was no need in his case to resort to the alternative provision relative to a position of like seniority, status and pay, and hence that provision has no relevancy as to this case.

(3) (Fourth of the court's listed provisions.) "He 'shall not be discharged from such position without cause within one year after such restoration'." The Trailmobile Company has fully complied with this requirement. Whirls, after reinstatement, was continued in the employ of the company and in his former position for more than one year without any discharge or any demotion which might be considered as tantamount to a discharge.

(4) (Third of the court's listed provisions.) "He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence."

Inasmuch as there has obviously been no deviation in this case from the first three of the statutory requirements

named, the respondent's position here must necessarily rest upon the fourth provision. Inasmuch, too, as the respondent's claim does not mention any rights to "insurance or other benefits" asserted by him, it appears that the issue here is narrowly limited to that of whether the respondent was restored to his position "without loss of seniority," within the meaning of that phrase and its statutory context. It is worthy of note that Whirls was in fact restored to his position without loss of seniority at the time of restoration and that more than a year elapsed before the alteration in his seniority date, of which he complains. Thus, the nature of the respondent's contention is clear. He insists that a restoration without loss of seniority includes an immunity from any loss in relation to any seniority right held by him from the time of restoration forward. We submit that such an interpretation is wholly outside either the language or the intendment of the Act.

It should be noted particularly that one distinguishing feature appears in relation to the rights spelled out in the fourth of the statutory provisions mentioned above, which serves to differentiate them from those created by the first three. The first three, *i.e.*, the rights to be accorded a waiting period, to reinstatement to employment, and to freedom from discharge, are similar one to the other, in that both the existence of the right and the incidents thereof are alike dependent upon the statute and no other source. They are rights which are created by the statute and the practical measure of their enjoyment is determined by the statute only. Rights established by the fourth provision differ in this respect. These latter are rights to *retain other rights* previously enjoyed, but which in the absence of statute might have been lost. The provision of Section 8 which refers to seniority guarantees the veteran against a *loss* of seniority, nothing more.

Presumably this includes a guarantee against a loss of *seniority rights*, and the courts generally have so interpreted it. There is nothing in the language of the statute, however, which purports to *create* seniority rights. Such rights are created by contract. Their scope and incidents must be defined by reference to the creating contract, not to the statute, whose only function is that of preserving in the veteran that which he originally had.

This, we understand to be the purport of the decision in the *Fishgold* case. In its opinion in that case this court said:

> "* * * These provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more." (90 L. Ed. Advance Sheets, pp. 967-968.)

Thus, it appears that the seniority rights reclaimed by the veteran on his return to private employment all have exactly the same status as those which he held on induction or enlistment. As we have seen in the first section of this brief, no seniority right is absolute. All are contingent and are subject to modification by a lawful and reasonable exercise of the same contracting powers

which created them. To say that the veteran, upon his return to his former position, shall enjoy seniority rights which cannot be so modified, is to give to him an absolute right of seniority higher in status than that which he previously enjoyed. This in essence constitutes the creation of a new seniority right in him by statute, a result not contemplated by the Selective Training and Service Act.

One further statement in the opinion rendered in the *Fishgold* case requires mention here. This court there said:

> "And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." (Page 967, Vol. 90, L. Ed. Advance Sheets.)

We have no quarrel with this statement as written. Obviously private contracts cannot be utilized to destroy rights conferred by statute. The quoted statement, however, does not support the respondent's contention here. The *statutory* right of the veteran is that of being restored to the full enjoyment of the *contract* rights of seniority held by him at the time of induction or enlistment. The nature and extent of these rights is to be determined by the contract which created them. If they had within them the potentiality of expansion and reduction in the course of the normal functioning of collective bargaining at the time when the veteran laid them aside to enter military service, they have the same potentiality when he picks them up again on his return. The reasonable exercise by his collective bargaining representative of its inherent power to amend or alter rights arising under its agreement does not in any way affect the statutory right of the veteran. The two are in no way inconsistent.

We submit, therefore, that the phrase of the statute "without loss of seniority" refers only to such losses as might arise by reason of absence on military service. It does not include the normal modifications or alterations of seniority rights which may be made from time to time by means otherwise lawful and proper.

B. Any Other Conclusion Would Produce Chaotic Result; Incompatible With Orderly and Settled Labor Relations

The concept of seniority and seniority rights originated and has reached its highest state of development in the railroad industry. This brief is presented in behalf of railroad employees. Our interest in the case arises from the firm belief that the decision of the Circuit Court of Appeals, if upheld, will involve the existing seniority system in such confusion as to make it unworkable.

Any system of seniority rights is necessarily built around the operating conditions of the industry where it functions. Thus, an industry whose operations are performed by unskilled production workers might well have a seniority system whereby all jobs are thrown into one seniority pool and are available to all employees in order of seniority. Another industry, however, may require in its operations the services of groups of skilled workers whose proficiencies may be in widely different fields. Members of any one group, while skilled in the work of that group, might be wholly unable to perform the work of another group. In such a situation, the only practicable seniority system is one which limits seniority rights to the job classification where the employee's skill enables him to function and advance. Some industrial firms may concentrate their entire operations in a single community while others must function in many localities. In the first, a company-wide seniority system is practicable, at

least within each job classification, while in the other, seniority rights must necessarily be limited to the point of employment.

Railroad operations are conducted by a large number of groups of employees, most of whom are skilled workers but whose skills are highly diversified. These operations are carried on at widely separated points. The railroad seniority system necessarily takes these operating factors into account. Separate seniority rights are recognized for different job classifications such as train or engine service employees, the various shop crafts, clerks, telegraphers, maintenance of way employees, signalmen, dispatchers, and the like, the total being a group of possibly 50 job classifications. In addition, each division, shop or office is likely to be considered as a separate seniority district as to employees in each job group. By multiplying the number of employee groups differentiated by their skills by the number of seniority districts on a large railroad system, we get a rough approximation of the number of separate seniority rosters which must be maintained and get some appreciation of the complexity of the system as a whole.

The railroad business is not a static one. Technical developments are constantly occurring. New tasks make new requirements of employee skills. Often questions arise as to what new tasks fall within the existing work jurisdiction of one group or another. Decisions of such points involve the seniority rights of employees because they expand or decrease the body of work to which the rights of the members of the group attach.

Changes occur from time to time, not only in the character of the work but also in the place of its performance. Such changes may take the form of consolidations of shops, offices, stations or operating divisions. Corresponding changes must be made in the seniority system.

When such a change in operating practices is contemplated, by any railroad company which is likely to disrupt existing seniority arrangements, it has become customary for the managing officials to call in the representatives of the unions whose members will be involved and request them to work out some solution as satisfactory as possible to all concerned which can then be embodied in an agreement with the employer. The task of the union under such circumstances is not easy. Frequently it must choose between conflicting equities of substantially equal merit. The settlements themselves are frequently complicated and involve "dovetailing" arrangements by which the names on two seniority rosters are fitted together and seniority rights and dates adjusted on the basis of a prearranged formula. Whatever the settlement reached, someone is almost certain to consider himself damaged. Even in light of the general rules of law indicated in the first section of this brief, suits by disgruntled employees have been numerous, although judgments entered in their favor have been few.

To this already troublesome situation, the doctrine of the lower courts in this case would add a further and, as we believe, an insuperable difficulty. If seniority dates of employee veterans are to be considered as immutably fixed by law in such manner as not to be susceptible to change by contracts legitimately made as to employees generally, we see no reason why other incidental seniority rights applicable to the extent of seniority districts or work coverages should not be similarly treated. If this is the law, then any union and any employer, faced with the necessity of making readjustments in the prevailing seniority system must always reckon with the fact that any returned veterans among the employees cannot be touched by any arrangement made, however necessary such an arrangement may be and however fair its terms.

We submit that such a result is not only inequitable to employees generally but also that in many instances it would prevent entirely the making of necessary seniority readjustments. For example, railroad companies sometimes discontinue one or more shops, offices or other facilities and consolidate the work in another, either existing or newly constructed for the purpose. Ordinarily the working force at the new point is made up from employees already working at the original points and seniority rights are adjusted by combining the old rosters through some method of dovetailing. The whole purpose of such arrangements is that of giving to the employees the nearest possible approximation of the seniority rights theretofore held by them. We do not see how it is possible to accomplish any such result and at the same time to guarantee to returned veterans the *exact* rights earlier held by them as to seniority dates, seniority points, the work content of their old jobs, and all of the other incidents of seniority. The existence of a body of employees holding inflexible statutory seniority rights impervious to any change in operating conditions or to needs for corresponding changes in seniority arrangements, will, we fear, impair the efficiency of industry, and so hamper the operation of the whole seniority system as to threaten it as an instrumentality of betterment for employees as a whole.

Such results will not be accomplished to the accompanying betterment of the returned veteran. For proof of this statement we need look no further than the facts of the present case. The Trailmobile Company could have eliminated all its present difficulties merely by taking another legal road to the goal which it sought to attain. It could have delayed any action until all returned veterans in the service of the Highland Body Company had served it for one year subsequent to their release from the armed services. It could then have liquidated that com-

pany, discharged its entire working force, veterans and non-veterans alike, and then, to such as applied, and as it wished to hire, could have reemployed the men in its own plant. Obviously any such course of action would have had a disrupting effect on employment relations far more severe than did the method actually pursued. More important, from the point of view of the returned veterans, the company could have rid itself of any possibility of seniority claims on their part by simply declining to rehire them.

The organizations in whose behalf this brief is filed represent many veterans reemployed in railroad service. They expect to continue to do so on terms of full equality with other employees, many of whom are non-veterans and many of whom are veterans who did not happen to leave railroad jobs to enter the armed services. We sincerely believe that attempts to give to the reemployed veteran a position of arbitrary preference will not in the end react to his advantage, but will instead make of him such a factor of uncertainty, impediment and litigation, as may well induce employers to rid themselves of his services as soon as possible.

We believe that there is but one practical solution to this problem. Let the veteran by all means be accorded his full rights of reemployment and his right to retain his position for a year free of discharge without cause. Let him be restored to his original place in the seniority system. With these advantages in his favor, he should then be merged into the general body of employees having thenceforth the same rights and obligations as others. The cause of human reconversion will not be served by an attempt to keep the reemployed veteran in a special category permanently set aside from others by the fact of war.

We believe, therefore, that the decisions of the lower courts in this case would result in making the seniority

system unworkable by robbing it of that flexibility which is necessary if it is to keep pace with changing industrial conditions. We believe further that in the end these decisions would prove damaging rather than beneficial to the veterans themselves.

These undesirable results would be permanent, not temporary. In the last sentence of its opinion, the Circuit Court of Appeals states that the original seniority status of this returned veteran is guaranteed "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company." Insofar as railroad service is concerned, tenures of employment are long, and returned veterans may be expected to hold their railroad jobs for many years. The Selective Training and Service Act, while originally designed as a temporary measure, has been amended in such manner that Section 8 has been made permanent law. (Public Law No. 473, 79th Congress, Second Session.) If the decision below is correct, it follows, therefore, that a quarter century hence the seniority rights of returned veterans would have to be preserved as of the time of their induction regardless of changed conditions and circumstances in the industry, and regardless of any necessities which might arise as to changes in seniority rules.

We cannot believe that it was the intent of Congress to thrust all industry and all collective bargaining into such a straitjacket for an indefinite period. We do not believe that it was intended that the reemployment of returned veterans should be made so burdensome as to give to industry an inducement to rid itself of them. Finally, we cannot see that any intent to bring about such a far-reaching result can be predicated upon the simple phrase "without loss of seniority."

CONCLUSION

We have pointed out above certain legal and factual propositions on the basis of which we believe that the decision below should be reversed.

First, seniority rights are contract rights and in common with other such rights are subject to modification by action of the parties to the contract, the employer and the collective bargaining representative, so long as no arbitrary or discriminatory results are achieved.

Second, the respondent's rights as an employee in this case were altered in a manner judicially determined to have been legitimate and proper. It is only by virtue of his status as a returned veteran that he can advance any possible claim here.

Third, the intent and purpose of Section 8 of the Selective Training and Service Act is to *preserve* seniority rights, not to *create* them. The rights so preserved to the returned veteran have attached to them all of the benefits and obligations and are as fully subject to modification after he has resumed their enjoyment as was the case before he entered the armed services.

Fourth, the legal principles inherent in the decision of the Circuit Court of Appeals are such that an application of them to the existing seniority system will result in impediments and complications so serious as to impair the efficient operation of the whole system and will make of the returned veteran such a disturbing factor in industry as will be likely to lead to results disadvantageous

even to him. Congress could not have intended to bring about any such disrupting consequences by the language used.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served the foregoing document upon all parties of record herein on the 18th day of November, 1946, by mailing a copy thereof to Mr. Morrison R. Waite and Mr. Philip J. Schneider, counsel for petitioner, The Trailmobile Company; Mr. Sol Goodman, counsel for petitioner, U.A.W.-C.I.O., and the Solicitor General of the United States, counsel for respondent.

CLARENCE M. MULHOLLAND.

pp. 12, 21, 10

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1946.

The Trailmobile Company and International Union, United Automobile, Aircraft, and Agricultural Workers of America, U. A. W.-C. I. O. Local No. 392, Petitioners, v. Lawrence Whirls.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 14, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case, like *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, presents a problem in the seniority standing of a reemployed veteran. It arises under § 8 of the Selective Training and Service Act of 1940.[1] The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces.[2] Here the question concerns the duration of the veteran's restored statutory seniority standing. The petitioners maintain that it ends with the first year of his reemployment. Respondent's position is that it lasts as long as the employment continues.[3] A suggestion

[1] 54 Stat. 885, 50 U. S. C. App. § 301 *et seq.* In 1944 there was a minor modification of § 8 not here relevant. 58 Stat. 798; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 278, note 1. As amended the Selective Training and Service Act expired in its major part March 31, 1947. Public Law 473, 79th Cong., 2d Sess. But § 8 is saved indefinitely.

[2] "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence." 328 U. S. 275, 285.

[3] Though the fact does not appear affirmatively in the record, the parties agree that Whirls upon his reemployment after his military

has also been made that occurrences taking place since the decision in the Circuit Court of Appeals may have rendered the cause moot.

The case is an aftermath of a general controversy over seniority rights which arose among the employees of two corporations following their consolidation on January 1, 1944. Because of the relation of the general controversy to this litigation a detailed statement of the facts becomes necessary. Prior to their consolidation the Highland Body Manufacturing Company had been a wholly owned subsidiary of the petitioner, the Trailmobile Company. The two corporations manufactured the same commodities in separate plants in Cincinnati, Ohio.[4] During 1943 under the plan of consolidation the supplies, equipment and personnel of Highland were transferred gradually to the plant of Trailmobile. It took over the assets and business of Highland and assumed all its obligations. The employees of Highland were transferred to the payroll of Trailmobile as of January 1, 1944, when the consolidation became fully effective.[5]

The employees of both companies had been affiliated with the American Federation of Labor. 51 N. L. R. B. 1106, 1108. At the time of the consolidation the High-

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service received in addition to the seniority he had acquired at the time of his entry into military service also seniority accrued during the period of his service, consistently with the standard of the *Fishgold* case. This accorded with the then effective collective bargaining agreement which provided: "In case of a national crisis, such as a declared or undeclared war, any man who relinquishes his job with the Company for services rendered to the Government, shall on his return retain his place on the seniority list with accumulation."

[4] See 51 N. L. R. B. 1106, 1107, for details of the companies' operations.

[5] In the last full year of independent operation, 1942, Highland had approximately 100 employees and produced commodities worth approximately $1,500,000 and Trailmobile had approximately 1,000 employees and produced commodities worth $12,000,000.

land group, including respondent, claimed seniority with Trailmobile as of the dates of their employment by Highland. The former Trailmobile employees opposed this, maintaining that the Highland personnel should be considered as new employees of Trailmobile, with seniority dating only from January 1, 1944. This dispute was submitted to national representatives of the A. F. of L. They decided in favor of the Highland group.

The former Trailmobile employees were dissatisfied with this decision. They outnumbered the Highland claimants about ten to one. Accordingly, reorganizing as a unit of the Congress of Industrial Organizations, they requested recognition as the exclusive bargaining agent of Trailmobile's employees, including the Highland transferees. An election was held under the auspices of the National Labor Relations Board, in which the new C. I. O. local was chosen as bargaining representative for a unit composed of both groups.[6]

Trailmobile accordingly negotiated with the C. I. O. and, in July, 1944, a collective bargaining agreement was concluded, effective as of June 21, 1944. It provided that the seniority rights of former Highland employees should be fixed as of January 1, 1944, regardless of the dates of their original employment by Highland.

Respondent Whirls had been in Highland's employ from 1935 to 1942, when he entered military service. He was honorably discharged and returned to his work with Highland in May, 1943.[7] He was thus among the employees

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[6] 51 N. L. R. B. 1106; 53 N. L. R. B. 1248. As the National Labor Relations Board determined that the appropriate bargaining unit was one composed of both Highland and Trailmobile employees, 51 N. L. R. B. at 1113, the ex-Highland employees, of course, lost the election, since there were many more Trailmobile employees. See note 5. The bargaining unit excluded supervisory and certain miscellaneous employees of both companies. 51 N. L. R. B. 1114–1115.

[7] See note 3.

transferred from Highland to Trailmobile as of January 1, 1944, whose seniority was reduced so as to start as of that date by the July, 1944, collective agreement with the C. I. O.

The Highland group contested the agreement's validity in the Ohio courts in a class suit brought July 17, 1944, by Hess, one of their number, on behalf of himself and 178 others similarly situated. These included 104 persons actually at work, veterans and nonveterans, among whom was Whirls, and 74 employees then in the armed forces. The petition alleged that Trailmobile then had about 500 employees in military service, of whom apparently some 426 were outside the Highland group.

The theory of the class suit was that, although the plaintiffs were not then members of the C. I. O., the collective bargaining agent was the representative of all employees in the unit and hence could not legally deprive a minority of the employees which it represented of their accrued seniority and other rights by any collective agreement with the company.[4] The petition alleged that the collective agreement arbitrarily and unlawfully deprived the plaintiffs of their "vested individual rights" and asked mandatory injunctive relief restoring each to seniority status as of the date of his employment by Highland. The company and the collective agent stood

[4] There are holdings that, although a collective bargaining agent may by contract with the employer modify the seniority structure, it must act in good faith toward all employees.' See Seniority Rights in Labor Relations (1937) 47 Yale L. J. 73, 90; Christenson, Seniority Rights under Labor Union Working Agreements (1937) 11 Temp. L. Q. 355, 370–371. The class suit was filed and determined before the decisions were rendered here in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210; *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248.

upon the terms of the collective agreement and the agent's authority as certified representative to make it as justifying the action taken under it.

The Ohio courts held against the plaintiffs in the action, sustaining the position of the company and the union.[9] They held in effect that the seniority rights in issue arose exclusively from contract, making no reference whatever to § 8 of the Selective Training and Service Act or any question relating to it;[10] that the company and the collective representative were lawfully empowered to enter into the contract fixing those rights as of January 1, 1944; that the trial court was not authorized, in its own language, "to contract for the plaintiff[s], or make a new contract," since that power "exists only in the collective bargaining agent under the provisions of the National Labor Relation's Act so long as that agent acts within the law."[11]

Accordingly the suit was dismissed. The record here does not disclose the date of the trial court's judgment. But its decision was affirmed by the Ohio Court of Appeals before October 2, 1945, when the union's answer was filed in the present cause; and the case had been finally determined against the plaintiff's claims by the Supreme Court of Ohio prior to October 15, 1945.[12]

The record is not entirely clear concerning the exact character and sequence of events between July 15, 1944, when Whirls and other former Highland employees were

[9] *Hess* v. *The Trailer Co.*, 31 O. O. 566, 17 O. Supp. 39, affirmed by the Court of Appeals, Hamilton County, Ohio, motion to certify record to the Ohio Supreme Court overruled, 31 O. Law Rep. 51; 18 Ohio BAR 314.

[10] The pleadings in the class suit have been made part of the record in this case. Neither they nor the findings and judgment of the trial court in that cause disclose any reference to or consideration of § 8 or its possible effects upon that litigation.

[11] See note 8 *supra*.

[12] See note 9 *supra*.

notified that their seniority status would be changed, and September 18, 1945, when the present suit was filed in the District Court. Apparently, after the notice was given, Selective Service officials intervened in behalf of Whirls and other veterans,[13] although his allegation that his seniority was restored as a result of that intervention was denied both by the company and by the union. There is ambiguity also concerning whether the closed-shop provision appeared in the 1944 agreement or only in the 1945 one between the company and the C. I. O. The facts of record, however, are more consistent with the view that it was not introduced until the latter year.

At any rate, in June or July, 1945, Whirls joined the C. I. O. union, thus complying with the closed-shop provisions of the collective agreement. And until about September 3 of that year he continued to be employed in the painting department, where he had the highest seniority and was drawing pay of $1.05 per hour. On or about that date, however, the company transferred him to the stock department, threatening to reduce his pay to $0.83 per hour and also to reduce his seniority rating in accordance with the collective agreement.

Whether or not the threatened reductions actually took effect is not clear from the record, for not long afterward Whirls was transferred again, to a position paying $1.18 per hour in another department. But before this was done, represented by the United States

[13] Whirls' petition in this case alleged that after the notice of July 15, 1944, "defendant herein again restored plaintiff to his date of hiring, as regulating his seniority, to-wit: February 8, 1935, pursuant to a directive of the Selective Service System of the United States, and he continued to benefit by such seniority status until on or about September 3, 1945, at which time" the defendant transferred him as stated below in the text and threatened, unless restrained, to reduce his pay and seniority rating.

Attorney,[14] he brought this suit in the District Court under the Selective Training and Service Act. He sought to enjoin the threatened decrease in pay and change in seniority status. He also asked for restoration to his former position in the painting department and to his seniority as fixed by his original employment with Highland. The employer answered and the local C. I. O. union intervened in support of the employer's position. However, since Whirls had been transferred again before the case came on for hearing, the parties agreed at the hearing to limit the issues to those affecting the question of seniority. This was presented in two forms, (1) on the merits, the facts being substantially stipulated; (2) on the question whether the state court proceeding in the class suit had determined the seniority rights of Whirls, making the issue now raised *res judicata* for this suit. See *Angel* v. *Bullington*, 330 U. S. —.

Taking respondent's view in both respects, the District Court rendered judgment in his favor. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court's judgment. 154 F. 2d 866. Besides holding *res judicata* inapplicable, both courts took the view, contrary to that later reached here in the *Fishgold* case, that the reemployed veteran was entitled to "superseniority" for one year following his reemployment,[15] and went on to hold that his statutory preferred status with respect to seniority and other incidents of his employment did not end with the expiration of that year. Because of the bear-

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[14] Section 8 (e) of the Selective Training and Service Act, quoted in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. at 280, note 3.

[15] The Court of Appeals expressly stated its disagreement with the views expressed by Judge Learned Hand, 154 F. 2d 785, writing for the majority of the Circuit Court of Appeals in the *Fishgold* case, the decision in which was affirmed here.

ing of the *Fishgold* decision upon the problem and the importance of the question presented, we granted certiorari. 328 U. S. 831.

I.

At the outset it is important, in view of certain questions which have been injected beyond the issues presented for decision, to state explicitly what is not before us. In the first place, we are not required to determine whether the class suit in the state courts constituted an adjudication of the rights of the parties involved in this litigation. That question was presented to the District Court and the Circuit Court of Appeals. Both determined it adversely to petitioners, but no error was assigned to this ruling in the petition for certiorari. The question is therefore not before this Court and we express no opinion concerning it.

The view entertained in this respect by the District Court and the Circuit Court of Appeals, however, has assumed tangental bearing in connection with the suggestion that the cause may have become moot. In its memorandum filed upon the application for certiorari and in its brief, the Government calls attention to certain events not appearing of record but taking place after the decision of the Court of Appeals. Though suggesting the facts for our attention, the Government maintains that they do not render the controversy moot. This Court, of course, does not render advisory opinions. And since the suggestion of the facts not only is sufficient to raise the question of mootness but has injected others not comprehended in the issues, it is necessary to dispose of the matter before undertaking a determination of the question otherwise properly here for decision.

It is suggested and not denied that under date of April 10, 1946, respondent was notified by the collective agent

that he had been charged with conduct unbecoming a member of the union, namely, in bringing this suit without exhausting the remedies provided by its constitution and by-laws; in thereby violating the collective agreement; in negotiating with the employer through others than the union; and in conducting himself in a manner harmful to its interests and those of its members. Accordingly, on April 15, 1946, the union requested Trailmobile to suspend Whirls from work. In consequence, the company directed him not to report for duty. Since then, however, it has continued to keep him on the payroll, on leave of absence with full pay. Although the Government urges that Whirls thus continues in the company's employ and consequently the case is not moot, its suggestion of the facts has overlaid the only issue brought here by the petition for certiorari with questions of unlawful discrimination allegedly arising out of the suggested facts, under the decisions in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210; and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248.[16]

The facts thus put forward have no proper bearing in this case otherwise than to suggest the question of mootness and to require that any decision which is made upon the merits here be made without prejudice to the future assertion of any rights of respondent which may have been violated by the conduct set forth. We agree that in the circumstances related he remains an employee of the company and the cause is not moot.

[16] The Government's brief puts the suggestion and discussion it makes as a matter of not desiring its "failure to explore the nature and causes" of the alleged discrimination to be taken "as an admission either that" there was not unfair discrimination under the *Steele*, *Tunstall* and *Wallace* cases, *supra*; or that such discrimination "cannot be redressed under § 8 . . . after the lapse of the initial year of reemployment. . . ."

We also agree that the question of unlawful discrimination is not properly before us for decision.[17] That question, insofar as it arose from events prior to this litigation, was involved in the Ohio class suit without reference, it would seem, to § 8 or its possible effects. And because the petition for certiorari, as we have noted, assigned no error to the Court of Appeals' ruling on the issue of *res judicata* arising from the outcome of the class suit, we are not at liberty now to consider the effect of that litigation or the issues of discrimination embraced in it. Insofar as any question of unlawful discrimination may be thought to arise from the facts said to have taken place after the decision of the Court of Appeals, we are also not free at this time to consider or determine such an issue. As the brief of the Government in respondent's behalf pertinently states, "These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party to the issue of unfair discrimination. Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556. In view of that fact, and of the *Hess* litigation, we believe that it would be inappropriate, at this stage, to argue these issues."

Wholly aside from any question of power, this disclaimer on behalf of the party affected is a sufficient reason to justify refusal to inject such an issue here or to volunteer aid not sought. We therefore are required to say no more concerning the matter now than that, if respondent has been unlawfully expelled, suspended or otherwise dealt with by the union for asserting his legal rights, the law has provided remedies for such injuries and they may be redressed in appropriate proceedings designed for that purpose upon proof of the facts constituting the wrong and due consideration of the legal issues they present. To assure this possibility, however, the remand which becomes necessary in this cause on the merits will be so

[17] See note 16.

framed as to preclude any foreclosure of such rights by possible future application of the doctrine of *res judicata* arising from this determination.

Since, moreover, in the view of the District Court and apparently of the Court of Appeals, the Ohio class suit was dispositive of issues of unlawful discrimination arising out of the facts presented in that litigation without reference to § 8,[18] it may be added that the Ohio determination could not apply, of course, to such discrimination taking place by virtue of later events.

We turn therefore to consideration of the sole question presented on the merits, namely, whether under § 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues.

II.

The relevant portions of §§ 8 (a) and 8 (b) are set out in the margin.[19] But we are concerned particularly with § 8 (c), which reads:

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[18] The Court of Appeals, noting that Whirls was not named as a party to the class suit other than as a member of the class, pointed out that numerous members of the armed forces were involved in both groups of employees, but that their interests as veterans under § 8 were not common to the nonveteran employees in either group. Hence, it concluded, the class suit was not appropriate for rendering a judgment binding upon veteran members of the complaining class as to the question of their seniority under § 8. 154 F. 2d 866, 872.

[19] "SEC. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a tem-

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leaves of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The Government argues on respondent's behalf that the correct meaning of § 8, and particularly of subsection (c), is that upon reemployment the veteran is entitled to retain indefinitely his prewar plus service-accumulated seniority.[20] Under the statute, it says, this seniority cannot be taken away by a collective bargaining agreement

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porary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . . ."

[20] The Government states that a veteran could be reduced in seniority on account of bona fide changed circumstances or on account of cause or upon waiver. ~~The Act contains no such provisions. The only "changed circumstance" provision relates to actual restoration of position, and the only "for cause" provision affects the right of discharge within the year after restoration.~~

As to this, see note 25.

or by the employer,[21] either during the year in which the statute insures the veteran against discharge without cause or thereafter while the employment continues.[22] Support for this view is thought to be derived from the syntax of the statutory language and from the legislative history.

It is argued that grammatically the "within one year" provision applies only to the last clause of subsection (c), relating to discharge without cause, and does not refer to the "other rights" [23] given by subsections (b) and (c), including restored statutory seniority. Because the "within one year" provision appears most proximately in connection with the prohibition against discharge, the Government seeks to give that prohibition, including its temporal term, effect as a command wholly distinct from and unrelated to anything preceding. It treats the clause as a grammatically independent sentence and a substan-

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[21] Seniority arises only out of contract or statute. An employee has "no inherent right to seniority in service. . . ." *Ryan* v. *New York Central R. R.*, 267 Mich. 202, 208; *Casey* v. *Brotherhood*, 197 Minn. 189, 191–192. "The seniority principle is confined almost exclusively to unionized industry." Decision (1946) 46 Col. L. Rev. 1030, 1031, and authorities cited. "In private employment seniority is typically created and delimited by a collective bargaining agreement. . . ." *Ibid.*

[22] See note 20.

[23] The Government's argument is limited to seniority. But it is equally applicable to the other components of "position," such as pay. Thus, if accepted, it would mean that after the guaranteed one year a veteran could be discharged but could not have his pay reduced.

The position to which an employee must be restored is either the position previously held or "a position of like seniority, status and pay." See note 18. It is thus recognized that part of the restored "position" is the seniority accrued prior to service in the armed forces and, under the *Fishgold* case, during service. "Seniority" is part of "position," and therefore when the Act states in subsection (c) that the veteran may not be discharged "from such position" it means both from the job itself and from the seniority which is part of the job.

tively unrelated provision, although it is separated from the earlier ones only by a comma followed by the conjunction "and."

On this premise of complete severability the Government builds its entire case. The premise necessarily regards § 8 (c) as making no express provision for the duration of "other rights," but as leaving this to be found wholly by implication. The Government then goes on to conclude that the period to be implied is indefinite. Although the statutory security against discharge ends with the prescribed year, the protection given by § 8 (c) to "other rights" is said therefore not only to be effective for that year, *cf. Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, but to continue in full force for as long as the job may last beyond that time. In this view, of course, the result would be to "freeze" the incidents of the employment indefinitely while "freezing" the right to the job itself for only one year.

Difficulties arise in connection with this construction, both in its premise and in its conclusions. One is that the conclusion of indefinite duration would not follow necessarily, if the premise of complete severability were acceptable. On that basis "indefinite duration" as the Government conceives it would not be the only tenable period or even the most probably contemplated one. Several alternatives would be presented. However, the statutory year would not be among them, since it is implicit in the premise of severability that the Act does not apply the concluding clause of § 8 (c) to "other rights" to secure their extension either during or after that time. On the other hand, the Government's view ignores the usual rule of construction where time is not expressly prescribed, but is evidently to be implied. For generally in such cases duration for a reasonable period is the term accepted by the law rather than permanency or indefinite extension.[24]

[24] See, *e. g.*, *Dillon* v. *Gloss*, 256 U. S. 368, 375; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313, 322; 1 Williston, Contracts (Rev. ed.) 152.

And this, in varying circumstances, might be found to be longer or shorter than the statutory year prescribed for the job itself.

The real trouble however is in the basic premise both grammatically and substantively. It assumes not only the complete independence of the last clause of § 8 from what precedes, but also that employment within the meaning of the Act is something wholly distinct and separate from its incidents, including seniority, rates of pay, etc. We think, however, that the idea of total severability is altogether untenable. To accept it would do violence both to the grammatical and to the substantive structure of the statute.

The clause is neither an independent sentence nor a disconnected prohibition without significant relationship to what precedes. "From such position" has no meaning severed from the prior language. The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged. Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior "restoration" clauses. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*. Indeed such reference is explicit both in the phrase "from such position" and in the time provision itself, namely, "within one year *after such restoration.*"

To tear the concluding clause from its context is therefore impossible. It is conjunctive with all that precedes. Nor is it any the more permissible to disconnect its constituent temporal term. There can be no doubt whatever that Congress intended by § 8 (c) to secure the "other rights" guaranteed by it for at least the minimum term of the prescribed one-year period. This indeed was a specific ruling of the *Fishgold* case.

The employee there had not been discharged in the sense of being thrown out of his job altogether. He simply had been deprived of the opportunity to work by the

operation of the seniority system when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his full standing under the Act. That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service. In the language of § 8 (c) he is to be "considered as having been on furlough or leave of absence during his period of active military service." The Court held, indeed, that the Act did not give him standing to outrank nonveteran employees who had more than the amount of seniority to which he was entitled to be and had been restored; in other words, that he was not given so-called "superseniority." But it also squarely held that he was given security not only against complete discharge, but also against demotion, for the statutory year. And demotion was held to mean impairment of "other rights," including his restored statutory seniority for that year. "If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of § 8 (c) be 'discharged from such position.'" 328 U. S. at 286.

That § 8 (c) applies to secure the protection of "other rights" for at least the statutory year was therefore inherent in the rationalization of the *Fishgold* decision. To that extent at any rate the concluding clause was held applicable, not severable, concerning them. This of course destroys the Government's basic premise of the complete severability of that clause and its resulting nonapplicability to "other rights." While the reemployed veteran did not acquire "superseniority," § 8 (c) gave him the restored standing for the minimum duration of the prescribed year.

It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it. Equally clearly Congress did not create them to be operative for the vaguely indefinite and variously applicable period of a reasonable time. But we cannot agree that they were given to last as long as the employment continues, unaffected by expiration of the one-year period.

To accept this conclusion, as we have said, would mean "freezing" the incidents of the employment indefinitely while "freezing" the right to employment itself for only one year. As long as the employee might remain in his job, his pay could not be reduced, his seniority could not be decreased, insurance and other benefits could not be adversely affected. And this would be true, although for valid reasons all of those rights could be changed to the disadvantage of nonveteran employees having equal or greater seniority and other rights than those of the veteran with restored statutory standing. The reemployed veteran thus not only would be restored to his job simply, as the *Fishgold* case required, "so that he does not lose ground by reason of his absence." 328 U. S. at 285. He would gain advantages beyond the statutory year over such nonveteran employees.

We do not think Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit. At the time it acted, we had not declared war and the men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year without prejudice because of their service. Visionary as this notion proved to be, it hardly can be taken to support the view that Congress contemplated "freezing" the specified incidents of restored employment indefinitely.

The *Fishgold* case, it is true, concerned only events taking place within the statutory year. As the Court of Appeals pointed out in distinguishing this case, 154 F. 2d at 871, the issues there involved no question of the reemployed veteran's standing after the statutory year. But, as we have said, the decision did hold that § 8 (c) applies to "other rights" for the year. And the rationalization was wholly inconsistent with the idea that those restored rights continued indefinitely after the year, unaffected by its termination. The restored veteran, it was held, could not be disadvantaged by his service to the nation. He "was not to be penalized on his return by reason of his absence from his civilian job." 328 U. S. at 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been on furlough or leave of absence." It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment. But the *Fishgold* decision also ruled expressly that he was not to gain advantage beyond such restoration, by virtue of the Act's provisions, so as to acquire "an increase in seniority over what he would have had if he had never entered the armed services. . . . No step-up or gain in priority can be fairly implied." 328 U. S. at 285–286.

For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy.[25] But if this

[25] Section 8 (c), it will be recalled, forbids discharge "without cause within one year." It may be that the "without cause" qualification applies to "other rights" as well as to total discharge, more especially in view of the position we take concerning the severability of the concluding clause of § 8 (c). But no question is presented in this case whether the employer, for cause, could demote a reemployed veteran within the statutory year consistently with the requirements of § 8 (c), and we express no opinion in this respect.

extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress.

We are unable therefore to accept the Government's position. Aside from the events taking place after the Court of Appeals' decision, which as we have said are not properly here for consideration except upon the question of mootness, Whirls was treated exactly as were other employees in his group having the same seniority and status as he had on the date of his reemployment. There was no discrimination against him as a veteran or otherwise than as a member of that group. Both groups, the former Trailmobile employees and the former Highland employees, who composed his group, contained veterans and nonveterans in large numbers. Both contained veterans in active service and reemployed veterans when the collective agreement was made. Whirls was treated exactly as all other members of his group, the ex-Highland employees, veterans and nonveterans alike. Whether or not the collective agreement was valid, or infringed rights of Whirls and other members of that group apart from rights given by § 8 (c), is not before us, for reasons we have stated. The only question here and the only one we decide is that § 8 (c), although giving the reemployed veteran a special statutory standing in relation to "other rights," as defined in the *Fishgold* case, during the statutory year, and creating to that extent a preference for him over nonveterans, did not extend that preference for a longer time.

On the facts therefore we are not required to determine the further question whether the statute would give pro-

tection to a reemployed veteran after the statutory year, if it were shown that he then had been demoted beneath his rightful standing under the Act as of the date of his restoration, though nonveteran employees having the same seniority standing as of that time had not been demoted or adversely affected. No such question is presented on the facts of record properly before us for consideration and decision. It will be time enough to consider such an issue whenever it may be presented.

We find it unnecessary therefore to pass upon petitioners' position in this case, namely, that all protection afforded by virtue of § 8 (c) terminates with the ending of the specified year. We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration. We expressly reserve decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker.

These reasons, founded in the literal construction of the statute and the policy clearly evident on its face, are sufficient for disposition of the case. They are not weakened by the Government's strained and unconvincing citation of the Act's legislative history.

That argument is grounded in conclusions drawn from changes made without explanation in committee with respect to various provisions finally taking form in § 8, changes affecting bills which eventually became the Selective Training and Service Act and the National Guard Act, 54 Stat. 854. Apart from the inconclusive character of the history, the Government's contention assumes that the only alternatives presented by the final form of the bill were indefinite duration for the incidents of the employment named and none at all. This ignores the other possibilities considered in this opinion, including duration

for a reasonable time. Moreover, as has been noted, the most important committee changes relied upon were made without explanation.[26] The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.[27]

As we have indicated above, the argument for respondent in this case is of whole cloth in principle with the contention for "superseniority" made and rejected in the *Fishgold* case, as indeed the District Court and the Court of Appeals regarded it. Lacking any better legislative footing, it equally cannot stand.

Accordingly the judgment of the Court of Appeals is reversed. This however will be without prejudice from the decision here to respondent's assertion in the future of any rights he may have against Trailmobile or the collective agent on account of their acts not presented on this record or involved in the issues determined by this decision.

It is so ordered.

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[26] See S. Rep. 1987, 76th Cong., 2d Sess.; H. Rep. 2847, 76th Cong., 3d Sess.; H. Rep. 2874, 76th Cong., 3d Sess.

[27] The Government also relies upon certain statements taken out of context from the debates. "As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions." *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 733. None of the selections is directed toward the question whether the veteran's seniority continues after the guaranteed one-year period so as to be not subject to modification by a collective bargaining agreement.

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1946.

The Trailmobile Company and International Union, United Automobile, Aircraft, and Agricultural Workers of America, U. A. W.-C. I. O. Local No. 392, Petitioners, v. Lawrence Whirls.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 14, 1947.]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter joins, dissenting.

Of the millions of wage earners whom the War took from their jobs into the armed services, some came from organized industries, others from unorganized industries; some had priority rights incident to their jobs, others had no such rights. For all, Congress provided the security of being able to get back their old jobs for at least a year after their return to civil life. But since industrial priority rights usually prevailing in organized industry have important bearing both on permanence of employment and wages, Congress guaranteed the veteran not merely "against loss of position" but also against "loss of seniority by reason of his absence. He acquires not only the same seniority he had, his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285. In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away.

Congress thus dealt with two very different aspects of employment. It gave all wage earners the assurance

of having their old jobs for a year. It further made imperative that wage earners who, by virtue of employment contracts, normally union contracts, had preferred positions should have the same preferred positions as those enjoyed by their fellows who had their status but remained behind. Congress limited the right to have a job to a year. But Congress, having assured a veteran the priority status he would have had had he remained at work, did not take away that status at the end of twelve months. Accordingly, because of the Congressionally assured status, whereby a veteran had a priority right that he would have had, had he never left, he has whatever rights that status gave an employee under the general law of contract and more particularly, as in this case, under the National Labor Relations Act.

The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services. If he could not be deprived of his seniority rights under the employment contract had he remained behind, he cannot be deprived of them because he is a veteran. Therefore, if under the National Labor Relations Act, those wielding the power of an exclusive bargaining agency on behalf of the veteran could not have discriminated against him had he not been a veteran, they cannot discriminate against him because he is a veteran. Any other result would fly so completely in the face of what Congress was about in fashioning economic security for the returning veterans, that it would require language totally wanting in what Congress wrote to find such a strange purpose on its part.

Congress did not authorize arbitrary reduction of the seniority rights to which the veteran had been restored at the end of the year. If his rights under the contract of employment assure that he will not be discharged before an employee with lower seniority and that he is entitled to a certain wage scale, he continues in employment with

this seniority status and is entitled to all its benefits, as long as others with lower seniority remain on the job.

In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement. It is not likely that in furthering this policy Congress would say that an employee, because he is a veteran, should suffer the consequences of having been to war after a year's return. The equality of treatment which Congress designed as between employees who went and employees who stayed could not be achieved by delaying for one year the disadvantages of having been away and then letting them affect the veteran.

Whirls came back from the army to his old work, where he had certain advantages of seniority. Now he has lost his seniority, and because he asked the courts to say whether he lost it legally he was booted out of his job and, moreover, was expelled from the union he had been compelled to join by reason of a closed shop agreement. He may find other employment at his old craft closed to him. This is rather shocking and it is hard to believe that Whirls has no protection in law.

What happened to Whirls is this: The employer to whose service he returned was merged or consolidated with a bigger concern of the same kind—a corporation which had owned the company for which Whirls worked—and both businesses were continued under one ownership. This united the two working forces and the question arose as to relative seniority rights. Both groups had belonged to American Federation of Labor unions, so the problem was submitted to its national authorities. They ruled that each employee should retain seniority rights dating from the time he entered the employ of either company.

The bigger group revolted. They demanded their own seniority and demanded that the smaller group coming

into the consolidation be treated as entirely new employees. They reorganized as a C. I. O. unit, demanded recognition as the exclusive bargaining agent of the whole enterprise and, of course, won the election. They then demanded and obtained a contract allowing their own seniority and establishing a closed shop. To keep his job at all, Whirls was obliged thereby to join the C. I. O. union and, with others, suffered reduction of pay and loss of seniority rights.

Believing that he and others had been unlawfully dealt with and being supported by the Government in the belief, he sought a remedy in the courts. His claim was not frivolous, for two courts below granted him relief. But because he tested his rights in court, he was expelled from the union on charges that he negotiated for himself through others than the union and acted in a way contrary and harmful to its interests. Since he was no longer a member of the union, it demanded under the closed shop agreement that the employer oust him from even the reduced job which its bargaining had left to him. The employer was obliged by its contract to comply but has been paying him on a leave-of-absence-with-pay basis. The short of it is that Whirls is out of seniority, out of work, and out of the union with all that this means in a closed shop industry. His predicament comes about not because of any fault of Whirls as a workman, nor because of his employer's wish.

The employer urges that we relieve it from the duty imposed by the court below of reinstating Whirls in his seniority rights because "the majority union members may compel the employer to discharge such returning veteran after the expiration of said one-year period. As in this case, the union might expel the veteran from the union, and thereby compel this employer to discharge such veteran under its closed shop contract with the union." One might have thought this an exaggerated fear conjured up

in hostility to the union except that it is just what has happened, and that instead of repudiating it now the union endorses the threat. It says that the union "must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supersede them on the seniority list, or, (b) in fairness to the Trailmobile veterans, negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment."

This combines a false alternative with a disingenuous threat. Both alternatives presuppose that the employer has an absolute right to discharge veterans after reemploying them for a year, whether or not they work under a contract which gives them seniority rights. But the question for decision is whether the veteran is secured in his seniority rights by the Act. If he is, he is to the extent of those rights under the employment contract entitled to his job even after the assured year has ended.

There is neither need nor authority to discriminate against any veteran of either plant. The fair solution would be that each employee go on the seniority list as of the date he entered either of the two units now consolidated. That was the solution under the collective agreement by which Whirls worked at the time of the consolidation. To thwart it, the whole machinery of the National Labor Relations Board was set in motion and apparently has been used in disregard of Whirls' rights under the Labor Act. Before we reach the question whether rights under the Labor Act have been infringed, however, it should be clear that the Selective Service Act secured Whirls' seniority rights, for it is those rights which he asserts were taken from him.

Section 8 (b) (B) refers to the job to which the veteran is entitled to be restored, *i. e.*, simply the same job which he left, or its equivalent. Section 8 (c) specifies what rights he shall have in that job. He is to have the senior-

ity which would have accumulated while he was in service and he is to be assured against discharge for one year, regardless of what his or others' seniority rights are. Such assurance against discharge certainly does not terminate seniority rights after one year. Section 8 (b) (B) together with the provision against arbitrary discharge is enough to assure that the veteran will remain in the same job for one year without diminution of its incidents. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 286, in which this Court said, "What it [Congress] undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year." 328 U. S. at 288.

That case interpreted the provisions against discharge as broad enough to prohibit also any reduction in status, pay, or seniority, during the year. But we did not hold that seniority rights ended with the year. Seniority rights are rights which, by their nature, endure as long as the employment does, and become more and more valuable in protecting that employment and enhancing its benefits. Ordinarily, one of their most important functions is to give a measure of security in the job. To have seniority rights for a year may not be an impossibility, but it is almost a contradiction in terms.

The job guaranteed against discharge for a year, then, is the job defined in § 8 (b) (B). But the right to discharge after the year is not unconditional where the employee is the beneficiary of a seniority plan. Of course, where employees have no seniority rights, the guarantee of one year's employment is their only right. But if a seniority system does exist, the Congress gave the employee "protection within the framework of the seniority system *plus* a guarantee against demotion or termination of the employment relationship without cause for a year." (Emphasis added.) *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. at 288.

It is to be noted that the seniority rights of Whirls were bargained away from him by a union which, under the National Labor Relations Act, was entitled to bargain as his representative. The Act makes the majority union "the exclusive representatives of all the employees in such unit" for bargaining. 49 Stat. 453, § 9 (a), 29 U. S. C. § 159 (a). We have held that this not only precludes the individual from being represented by others but also prevents him from bargaining for himself. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332. While the individual is thus placed wholly in the power of the union, it does not follow that union powers have no limit. Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed to represent. The National Labor Relations Act, in authorizing union organizations "for the purpose of collective bargaining or other mutual aid or protection," 49 Stat. 452, § 7, 29 U. S. C. § 157, indicates no purpose to excuse unions from these wholesome principles of trusteeship.

We have held under a similar Act that the courts may intervene to prevent a majority union from negotiating a contract in favor of itself against a colored minority. Speaking for all but two members of the Court, Chief Justice Stone, after recognizing that the representatives may make "contracts which may have unfavorable effects on some of the members of the craft represented" in such matters as seniority, based on relevant differences of conditions, said: "Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences." *Steele* v. *Louisville*

& Nashville Railroad Co., 323 U. S. 192, 203. That opinion also declared that "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." 323 U. S. at 202. And in *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210, we held that where an individual is without available administrative remedies, the courts must grant him protection.

I do not think that Whirls' seniority rights after one year are made immutable or immune from collective bargaining. But the statute restored these rights to him as a veteran. They stand until they are lawfully modified. The record indicates that they have never been terminated or modified by good faith collective bargaining in the interests of the craft. It raises the suspicion that they were simply misappropriated to the benefit of the majority group which was under a duty to represent his interests as well as its own.

The courts cannot tolerate the expulsion of a member of a union, depriving him of his right to earn a living merely because he invokes the process of the courts to protect his rights—even if he does so mistakenly. The Labor Relations Act makes it an unfair labor practice by an employer "To discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in proceedings under it. 49 Stat. 453, § 8, 29 U. S. C. § 158. Neither may a union use its own power over its members to by-pass the courts. *Cf. Dorchy* v. *Kansas*, 272 U. S. 306.

This action is equitable in character and equity traditionally adapts its remedies to the facts as developed by trial rather than to the form of pleadings. There could be no objection if the Court would remand the case for devel-

opment of a more complete record. But I could not agree that it should be done with the suggestion that Whirls was not treated with discrimination because all in the Highland group were treated alike. If the Trailmobile Company had absorbed the wholly-owned Highland Company before Whirls returned and used the consolidation as an excuse to deny Whirls reemployment rights, this Court would hardly have approved so transparent a scheme. The union has no more right to rely on the consolidation to justify deprivation of seniority rights.